

The NORTH CAROLINA *REGISTER*

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ISSUE DATE: August 3, 1992

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INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE

NORTH CAROLINA REGISTER

The *North Carolina Register* is published twice a month and contains information relating to agency, executive, legislative and judicial actions required by or affecting Chapter 150B of the General Statutes. All proposed administrative rules and notices of public hearings filed under G.S. 150B-21.2 must be published in the Register. The Register will typically comprise approximately fifty pages per issue of legal text.

State law requires that a copy of each issue be provided free of charge to each county in the state and to various state officials and institutions.

The *North Carolina Register* is available by yearly subscription at a cost of one hundred and five dollars (\$105.00) for 24 issues. Individual issues may be purchased for eight dollars (\$8.00).

Requests for subscription to the North Carolina Register should be directed to the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, N. C. 27611-7447.

ADOPTION AMENDMENT, AND REPEAL OF RULES

The following is a generalized statement of the procedures to be followed for an agency to adopt, amend, or repeal a rule. For the specific statutory authority, please consult Article 2A of Chapter 150B of the General Statutes.

Any agency intending to adopt, amend, or repeal a rule must first publish notice of the proposed action in the *North Carolina Register*. The notice must include the time and place of the public hearing (or instructions on how a member of the public may request a hearing); a statement of procedure for public comments; the text of the proposed rule or the statement of subject matter; the reason for the proposed action; a reference to the statutory authority for the action and the proposed effective date.

Unless a specific statute provides otherwise, at least 15 days must elapse following publication of the notice in the *North Carolina Register* before the agency may conduct the public hearing and at least 30 days must elapse before the agency can take action on the proposed rule. An agency may not adopt a rule that differs substantially from the proposed form published as part of the public notice, until the adopted version has been published in the *North Carolina Register* for an additional 30 day comment period.

When final action is taken, the promulgating agency must file the rule with the Rules Review Commission (RRC). After approval by RRC, the adopted rule is filed with the Office of Administrative Hearings (OAH).

A rule or amended rule generally becomes effective 5 business days after the rule is filed with the Office of Administrative Hearings for publication in the North Carolina Administrative Code (NCAC).

Proposed action on rules may be withdrawn by the promulgating agency at any time before final action is taken by the agency or before filing with OAH for publication in the NCAC.

TEMPORARY RULES

Under certain emergency conditions, agencies may issue temporary rules. Within 24 hours of submission to OAH, the Codifier of Rules must review the agency's written statement of findings of need for the temporary rule pursuant to the provisions of G.S. 150B-21.1. If the Codifier determines that the findings meet the criteria in G.S. 150B-21.1, the rule is entered into the NCAC. If the Codifier determines that the findings do not meet the criteria, the rule is returned to the agency. The agency may supplement its findings and resubmit the temporary rule for an additional review or the agency may respond that it will remain with its initial position. The Codifier, thereafter, will enter the rule into the NCAC. A temporary rule becomes effective either when the Codifier enters the rule in the Code or on the 10th business day after the agency resubmits the rule without change. The temporary rule is in effect for the period specified in the rule, up to 180 days, whichever is less. An agency adopting a temporary rule must begin rule-making procedures on the permanent rule at the same time the temporary rule is filed with the Codifier.

NORTH CAROLINA ADMINISTRATIVE CODE

The North Carolina Administrative Code (NCAC) is a compilation and index of the administrative rules of 25 state agencies and 38 occupational licensing boards. The NCAC comprises approximately 15,000 letter size, single spaced pages, material of which approximately 35% of is changed annually. Compilation and publication of the NCAC is mandated by G.S. 150B-21.18.

The Code is divided into Titles and Chapters. Each state agency is assigned a separate title which is further broken down into chapters. Title 21 is designated for occupational licensing boards.

The NCAC is available in two formats.

- (1) Single pages may be obtained at a minimum cost of two dollars and 50 cents (\$2.50) for 10 pages or plus fifteen cents (\$0.15) per each additional page.
- (2) The full publication consists of 53 volumes, totaling in excess of 15,000 pages. It is supplemented monthly with replacement pages. A one year subscription to the full publication including supplements can be purchased for seven hundred and fifty dollars (\$750.00). Individual volumes may also be purchased with supplement service. Renewal subscriptions and supplements to the initial publication are available.

Requests for pages of rules or volumes of the NCAC should be directed to the Office of Administrative Hearings.

CITATION TO THE NORTH CAROLINA REGISTER

The *North Carolina Register* is cited by volume, issue, number and date. **1:1 NCR 101-201, April 1, 1986** refers to Volume 1, Issue 1, pages 101 through 201 of the *North Carolina Register* issued on April 1, 1986.

FOR INFORMATION CONTACT: Office of Administrative Hearings, ATTN: Rules Division, P.O. Drawer 27447, Raleigh, North Carolina 27611-7447, (919) 733-2678.

NORTH CAROLINA REGISTER



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NORTH CAROLINA REGISTER

Publication Schedule

(August 1992 - December 1993)

Issue Date	Last Day for Filing	Last Day for Electronic Filing	Earliest Date for Public Hearing	Earliest Date for Adoption by Agency	Last Day to Submit to RRC	*Earliest Effective Date
*****	*****	*****	*****	*****	*****	*****
08/03/92	07/13/92	07/20/92	08/18/92	09/02/92	09/20/92	11/02/92
08/14/92	07/24/92	07/31/92	08/29/92	09/13/92	09/20/92	11/02/92
09/01/92	08/11/92	08/18/92	09/16/92	10/01/92	10/20/92	12/01/92
09/15/92	08/25/92	09/01/92	09/30/92	10/15/92	10/20/92	12/01/92
10/01/92	09/10/92	09/17/92	10/16/92	10/31/92	11/20/92	01/04/93
10/15/92	09/24/92	10/01/92	10/30/92	11/14/92	11/20/92	01/04/93
11/02/92	10/12/92	10/19/92	11/17/92	12/02/92	12/20/92	02/01/93
11/16/92	10/23/92	10/30/92	12/01/92	12/16/92	12/20/92	02/01/93
12/01/92	11/06/92	11/13/92	12/16/92	12/31/92	01/20/93	03/01/93
12/15/92	11/24/92	12/01/92	12/30/92	01/14/93	01/20/93	03/01/93
01/04/93	12/09/92	12/16/92	01/19/93	02/03/93	02/20/93	04/01/93
01/15/93	12/22/92	12/31/92	01/30/93	02/14/93	02/20/93	04/01/93
02/01/93	01/08/93	01/15/93	02/16/93	03/03/93	03/20/93	05/03/93
02/15/93	01/25/93	02/01/93	03/02/93	03/17/93	03/20/93	05/03/93
03/01/93	02/08/93	02/15/93	03/16/93	03/31/93	04/20/93	06/01/93
03/15/93	02/22/93	03/01/93	03/30/93	04/14/93	04/20/93	06/01/93
04/01/93	03/11/93	03/18/93	04/16/93	05/01/93	05/20/93	07/01/93
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07/15/93	06/23/93	06/30/93	07/30/93	08/14/93	08/20/93	10/01/93
08/02/93	07/12/93	07/19/93	08/17/93	09/01/93	09/20/93	11/01/93
08/16/93	07/26/93	08/02/93	08/31/93	09/15/93	09/20/93	11/01/93
09/01/93	08/11/93	08/18/93	09/16/93	10/01/93	10/20/93	12/01/93
09/15/93	08/24/93	08/31/93	09/30/93	10/15/93	10/20/93	12/01/93
10/01/93	09/10/93	09/17/93	10/16/93	10/31/93	11/20/93	01/04/94
10/15/93	09/24/93	10/01/93	10/30/93	11/14/93	11/20/93	01/04/94
11/01/93	10/11/93	10/18/93	11/16/93	12/01/93	12/20/93	02/01/94
11/15/93	10/22/93	10/29/93	11/30/93	12/15/93	12/20/93	02/01/94
12/01/93	11/05/93	11/15/93	12/16/93	12/31/93	01/20/94	03/01/94
12/15/93	11/24/93	12/01/93	12/30/93	01/14/94	01/20/94	03/01/94

* The "Earliest Effective Date" is computed assuming that the agency follows the publication schedule above, that the Rules Review Commission Approves the rule at the next calendar month meeting after submission, and that RRC delivers the rule to the Codifier of Rules five (5) business days before the 1st business day of the next calendar month.

**EXECUTIVE ORDER NUMBER 171
EXTENSION OF EXECUTIVE ORDER 45**

By the authority vested in me as Governor by the Constitution and laws of North Carolina, IT IS

ORDERED:

Executive Order Number 45, as reissued and extended by Executive Order Number 93, and as amended and extended by Executive Order Number 111, is reissued and extended for a period of two years, unless terminated earlier or extended by further Executive Order.

This Executive Order shall be effective immediately.

Done in Raleigh, North Carolina, this the 13th day of July, 1992.

TITLE 2 - DEPARTMENT OF AGRICULTURE

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Plant Conservation Board intends to amend rule(s) cited as 2 NCAC 48F .0301 and .0302.

The proposed effective date of this action is November 2, 1992.

The public hearing will be conducted at 10:00 a.m. on August 19, 1992 at the Board Room, Agriculture Bldg., 2 W. Edenton St., Raleigh, NC 27601.

Reason for Proposed Action: To change protected status of several plant species.

Comment Procedures: Interested persons may present statements either orally or in writing at the public hearing or in writing prior to September 2, 1992 by mail addressed to Cecil Frost, Secretary of the North Carolina Plant Conservation Board, P.O. Box 27647, Raleigh, NC 27611-7647.

CHAPTER 48 - PLANT INDUSTRY

SUBCHAPTER 48F - PLANT CONSERVATION

SECTION .0300 - ENDANGERED PLANT SPECIES LIST: THREATENED PLANT SPECIES LIST: LIST OF SPECIES OF SPECIAL CONCERN

.0301 ENDANGERED PLANT SPECIES LIST

The North Carolina Plant Conservation Board hereby establishes the following list of endangered plant species:

- (1) *Aeschynomene virginica* -- (L.) B.S.P.
Sensitive Jointvetch;
- (2) *Amorpha georgiana* var. *georgiana* -- Wilbur
georgia indigo-bush;
- (3) *(2)Arethusa bulbosa* -- L.
Bog Rose;
- (4) *(3)Asplenium heteroresiliens* -- W. H. Wagner
Carolina Spleenwort;
- (5) *(4)Asplenium monanthes* -- L.
Single-sorus Spleenwort;
- (6) *(5)Aster depauperatus* -- Fernald
Serpentine Aster;
- (7) *(6)Bryocrumia andersonii* -- (Bartr.) Anders.
Gorge Moss;
- (8) *(7)Buckleya distichophylla* -- (Nuttall) Torrey
Piratebush;
- (9) *(8)Calamagrostis cainii* -- Hitchcock
Cain's Reed Grass;
- (10) *(9)Calamovilfa brevipilis* -- (Torrey) Scribner
Pine Barrens Sandreed;
- (11) *(10)Cardamine micranthera* -- Rollins
Small-anthered Bittercress;
- (12) *(11)Carex aenea* -- Fernald
Fernald's Hay Sedge;
- (13) *(12)Carex barrattii* -- Schweinitz and Torrey
Barratt's Sedge;

(14) (13)*Carex manhartii* -- Bryson
Manhart's Sedge;

(15) (14)*Carex schweinitzii* -- Dewey ex Schweinitz
Schweinitz's Sedge;

(16) (15)*Chrysoma pauciflosculosa* -- (Michx.) Greene
Woody Goldenrod;

(17) (16)*Conioselinum chinense* -- (L.) B.S.P.
Hemlock Parsley;

(18) (17)*Cystopteris tennesseensis* -- Shaver
Tennessee Bladderfern;

(19) (18)*Dalibarda repens* -- L.
Robin Runaway;

(20) (19)*Delphinium exaltatum* -- Aiton
Tall Larkspur;

(21) (20)*Echinacea laevigata* -- (Boynton and Beadle) Blake
Smooth Coneflower;

(22) (21)*Eriocaulon lineare* -- Small
Linear Pipewort;

(23) (22)*Eupatorium resinosum* -- Torrey ex DC
Resinous Boneset;

(24) (23)*Filipendula rubra* -- (Hill) B.L. Robins.
Queen-of-the-Prairie;

(25) (23)*Gentianopsis crinita* -- (Froelich) Ma
Fringed Gentian;

(26) (24)*Geum radiatum* -- Michaux
Spreading Avens;

(27) (25)*Grammitis nimbata* -- (Jenm.) Proctor
Dwarf Polypody Fern;

(28) (26)*Helianthus schweinitzii* -- T. & G.
Schweinitz's Sunflower;

(29) (27)*Hexastylis contracta* -- Blomquist
Mountain Heartleaf;

(30) (28)*Hexastylis naniflora* -- Blomquist
Dwarf-flowered Heartleaf;

(31) (29)*Houstonia purpurea* var. *montana* -- (Small) Terrell
Mountain Bluet;

(32) (30)*Hudsonia montana* -- Nutt.
Mountain Golden Heather;

(33) (30)*Hydrastis canadensis* -- L.
Goldenseal;

(34) (31)*Isotria medeoloides* -- (Pursh) Raf.
Small Whorled Pogonia;

(35) (32)*Juncus trifidus* ssp. *carolinianus* -- Hamet Ahti
One-flowered Rush;

(36) (33)*Kalmia cuneata* -- Michaux
White Wicky;

(37) (34)*Lindera melissaefolia* -- (Walter) Blume
Southern Spicebush;

(38) (35)*Lindera subcoriacea* -- Wofford
Bog Spicebush;

(39) (36)*Lophiola aurea* -- Ker-Gawl.
Golden Crest;

(40) (37)*Lysimachia asperulaefolia* -- Poiret
Rough-leaf Loosestrife;

(41) (38)*Lysimachia fraseri* -- Duby

Fraser's Loosestrife;
(42) (39)*Minuartia godfreyi* -- (Shinners) McNeill
Godfrey's Sandwort;
(43) (40)*Minuartia uniflora* -- (Walter) Mattfield
Single-flowered Sandwort;
(44) (41)*Muhlenbergia torreyana* -- (Schultes) Hitchcock
Torrey's Muhly;
(45) (42)*Myrica gale* -- L.
Sweet Gale;
(46) (43)*Narthecium americanum* -- Ker
Bog Asphodel;
(47) (44)*Orbexilum macrophyllum* -- (Rowlee ex Small) Rydberg
Bigleaf Scurfpea;
(48) (45)*Orthotrichum keeverae* -- Crum & Anders.
Keever's Bristle Moss;
(49) (46)*Oxypolis canbyi* -- (Coulter & Rose) Fern.
Canby's Cowbane;
(50) (47)*Parnassia caroliniana* -- Michaux
Carolina Grass-of-Parnassus;
(51) (48)*Pellaea wrightiana* -- Hooker
Wright's Cliff-brake Fern;
(52) *Plagiochila caduciloba*
A Liverwort;
(53) (49)*Plantago cordata* -- Lam.
Heart-leaf Plantain;
(54) (50)*Plantago sparsiflora* -- Michaux
Pineland Plantain;
(55) (51)*Platanthera integrilabia* -- (Correll) Leur
White Fringeless Orchid;
(56) (52)*Poa paludigena* -- Fernald & Wiegand
Bog Bluegrass;
(53) ~~*Portulaca smallii* — P. Wilson~~
Small's Portulaca;
(57) (54)*Pteroglossaspis ecristata* -- (Fernald) Rolfe
Eulophia;
(58) (55)*Ptilimnium nodosum* -- (Rose) Mathias
Harperella;
(59) (56)*Pyxidanthera barbulata* var. *brevifolia* -- (Wells) Ahles
Wells' Pyxie-moss;
(60) (57)*Rhus michauxii* -- Sargent
Michaux's Sumac;
(61) *Rhynchospora macra* — (C.B. Clarke) Small
Large Beak Sedge;
(62) *Rudbeckia heliopsis* — Torr. & Gray
Sun-facing coneflower;
(63) (58)*Sagittaria fasciculata* -- E.O. Beal
Bunched Arrowhead;
(64) (59)*Sarracenia jonesii* -- Wherry
Mountain Sweet Pitcher Plant;
(65) (60)*Sarracenia oreophila* -- (Kearney) Wherry
Green Pitcher Plant;
(66) (61)*Schalbea americana* -- L.
Chaffseed;
(67) (62)*Sedum pusillum* -- Michaux
Puck's Orpine;

- (68) (63)*Sedum rosea* -- (L.) Scop.
Roseroott;
- (69) (64)*Senecio schweinitzianus* -- Nuttall
Schweinitz's Groundsel;
- (70) (65)*Shortia galacifolia* -- T. & G.
Oconee Bells;
- (71) (66)*Sisyrinchium dichotomum* -- Bicknell
Reflexed Blue-eyed Grass;
- (72) (67)*Solidago ptarmicoides* -- (Nees) Boivin
Prairie Goldenrod;
- (73) (68)*Solidago pulchra* -- Small
Carolina Goldenrod;
Blue Ridge Goldenrod;
- (74) (69)*Solidago spithamea* -- M.A. Curtis
- (75) (70)*Solidago verna* -- M.A. Curtis ex T. & G.
Spring-flowering Goldenrod;
- (76) (71)*Spiraea virginiana* -- Britton
Virginia Spiraea;
- (77) (72)*Sporobolus heterolepis* -- Gray
Prairie Dropseed;
- (78) (73)*Stylosma pickeringii* var. *pickeringii* -- (Torrey ex M.A. Curtis) Gray
Pickering's Morning Glory;
- (79) (74)*Thalictrum cooleyi* -- Ahles
Cooley's Meadowrue;
- (80) Tortula ammonsiana
Ammon's Tortula;
- (81) (75)*Trillium pusillum* -- Michaux
Carolina Least Trillium;
- (82) (76)*Trisetum spicatum* var. *molle* -- (Michaux) Beal
Soft Trisetum.

Statutory Authority G.S. 106-202.15.

0302 THREATENED PLANT SPECIES LIST

The North Carolina Plant Conservation Board hereby establishes the following list of threatened plant species:

- (1) *Amaranthus pumilus* -- Raf.
Seabeach Amaranth;
- (2) *Amorpha georgiana* var. *confusa* -- Wilbur
Savanna Indigo-bush;
- (3) (2)*Cacalia rugelia* -- (Shuttl. ex Chapm) Barkley & Cronq.
Rugel's Ragwort;
- (4) (3)*Camassia scilloides* -- (Raf.) Cory
Wild Hyacinth;
- (5) (4)*Carex chapmanii* -- Steudel
Chapman's Sedge;
- (6) (5)*Carex conoidea* -- Willd.
Cone-shaped Sedge;
- (7) (6)*Carya myristicaeformis* -- (Michaux f.) Nuttall
Nutmeg Hickory;
- (8) (7)*Eleocharis halophila* -- Fern. & Brack.
Salt Spikerush;
- (9) (8)*Fimbristylis perpusilla* -- Harper ex Small & Britton
Harper's Fringe-rush;
- (10) (9)*Geum geniculatum* -- Michaux
Bent Avens;

(11) *Glyceria nubigena* -- W.A. Anderson
Smoky Mountain Mannagrass;

(12) *Gymnoderma lineare* -- (Evans) Yoshimura & Sharp
Gnome Finger Lichen;

(13) *Helonias bullata* -- L.
Swamp Pink;

(13) *Hudsonia montana* -- Nuttall
~~Mountain Golden Heather;~~

(14) *Ilex collina* -- Alexander
Long-stalked Holly;

(15) *Isoetes piedmontana* -- (Pfeiffer) Reed
Piedmont Quillwort;

(16) *Liatris helleri* -- (Porter) Porter
Heller's Blazing Star;

(17) *Lilaeopsis carolinensis* -- Coulter & Rose
Carolina Lilaeopsis;

(18) *Lilium grayi* -- Watson
Gray's Lily;

(19) *Menyanthes trifoliata* -- L.
Buckbean;

(20) *Myriophyllum laxum* -- Schuttew. ex Chapman
Loose Watermilfoil;

(21) *Platanthera integra* -- (Nuttall) Gray ex Beck
Yellow Fringeless Orchid;

(22) *Platanthera nivea* -- (Nutt.) Luer
Snowy Orchid;

(23) *Portulaca smallii* -- P. Wilson
Small's Portulaca;

(24) *Rhexia aristosa* -- Britton
Awned Meadow-beauty;

(23) *Rudbeckia heliopsis* -- T. & G.
Sun-facing Coneflower;

(25) *Ruellia humilis* -- Nutt.
Low Wild-petunia;

(26) *Sabatia kennedyana* -- Fern.
Plymouth Gentian;

(27) *Schisandra glabra* -- (Brickel) Rehder
Magnolia-vine;

(28) *Schlotheimia lancifolia* -- Bartr.
Highlands Moss;

(29) *Senecio millefolium* -- T. & G.
Divided-leaf Ragwort;

(30) *Sporobolus teretifolius* -- Harper
Wireleaf Dropseed;

(31) *Thelypteris simulata* -- (Davenp.) Nieuwl.
Bog Fern;

(32) *Trichomanes boschianum* -- Sturm ex Bosch
Appalachian Filmy-fern;

(33) *Trichomanes petersii* -- A. Gray
Dwarf Filmy-fern;

(34) *Trillium discolor* -- Wray ex Hook.
Mottled Trillium;

(35) *Utricularia olivacea* -- Wright ex Grisebach
Dwarf Bladderwort.

Statutory Authority G.S.106-202.15.

**TITLE 4 - DEPARTMENT OF ECONOMIC
AND COMMUNITY DEVELOPMENT**

Notice is hereby given in accordance with G.S. 50B-21.2 that the Department of Economic and Community Development/Division of Community Assistance intends to repeal rule(s) cited as 4 NCAC 19L .1401-.1405.

The proposed effective date of this action is November 1, 1992.

Instructions on How to Demand a Public Hearing must be requested in writing within 15 days of notice): Written requests for a Public Hearing must be received by August 18, 1992. Written requests should be sent to Bob Chandler, Director, Division of Community Assistance, 1307 Glenwood Avenue, Raleigh, NC 27605.

Reason for Proposed Action: The proposed action is necessary due to the transfer of Economic Development projects to the Commerce Finance Center Division. These Rules are adopted effective July 20, 1992 and codified as 4 NCAC 1K.

Comment Procedures: Oral or written comments will be accepted until September 2, 1992. Written comments should be sent to Bob Chandler, Director, Division of Community Assistance, 1307 Glenwood Avenue, Raleigh, NC 27605. Oral comments should be directed to Gail Brock at (919) 733-850.

Editor's Note: These Rules were filed as temporary repeals effective July 20, 1992 for a period of 80 days or until the permanent rules are effective, whichever is sooner.

**CHAPTER 19 - DIVISION OF COMMUNITY
ASSISTANCE**

**SUBCHAPTER 19L - NORTH CAROLINA
COMMUNITY DEVELOPMENT
BLOCK GRANT PROGRAM**

**SECTION .1400 - ECONOMIC
DEVELOPMENT PROJECTS**

.1401 DEFINITION

~~The Economic Development grant category includes activities in which a majority of funds are directed toward promoting the creation or retention of jobs principally for persons of low- and moderate-income. Projects in this category must result in direct creation or retention of jobs within the grant program period. All eligible CDBG activities may be undertaken for the purposes of economic development. All CDBG expenditures which directly assist participating private entities must be returned to grant recipients or to the Department as provided in Rule .0907 of this Subchapter. The Department may allocate up to one million dollars (\$1,000,000) of any annual allocation of Economic Development funds for projects designed to assist small businesses. A small business is defined as a private entity which employs 20 or fewer full time or full time equivalent employees; and which generates no more than seven hundred and fifty thousand dollars (\$750,000) in average annual gross sales in the latest three year period as indicated by federal and state tax records. Any funds not utilized for the Small Business Loan Program will revert to the regular Economic Development grant category. Applications for the Small Business Loan Program must meet the eligibility requirements and preliminary award requirements as provided in Rules .1402(a)-(f) and .1404. Selection criteria for the Small Business Loan Program are outlined in Rule .1405.~~

Authority G.S. 143-323; 42 U.S.C.A. 5301; 24 C.F.R. 570.489.

.1402 ELIGIBILITY REQUIREMENTS

~~(a) Applications for Economic Development funds must show that at least 60 percent of the CDBG funds proposed for each activity will benefit low- and moderate-income persons. Applicants that do not meet this requirement will not be rated or funded. In designing projects which meet this requirement, applicants must appropriately ensure that activities do not benefit moderate-income persons to the exclusion of low-income persons.~~

~~(b) Applicants shall have the capacity to administer a Community Development Block Grant program. The Department may examine the following areas to determine capacity:~~

~~(1) audit and monitoring findings on previously funded Community Development~~

Block Grant programs, and the applicant's fiscal accountability as demonstrated in other state and federal programs or local government financial reports; and

(2) the rate of expenditure of funds and past accomplishments of other project commitments in previously funded Community Development Block Grant programs.

Applicants that show a lack of capacity will not be rated or funded.

(c) All Economic Development applications utilizing other sources of funds in addition to the Community Development Block Grant shall include firm commitments of these funds from each funding source except those funds from Section 119 of P.L. 95-128, the Housing and Community Development Act of 1977 and shall include documentation that these funds are currently available for the proposed project.

(d) A standardized letter of commitment must be completed and signed by the participating private entity and submitted with the application. The exact form and language of the letter will be prescribed by the Department and must be followed by the applicant. The contents of the letter will include a commitment by the private entity to carry out the project as described in the CDBG application.

(e) Documentation from the private entity that the proposed project would not be undertaken unless the requested CDBG funds were made available must be submitted with the application.

(f) No application will be rated or funded without firm commitments except as provided in Rule .1402(c) of this Subchapter.

(g) Each project must meet the requirements of Rule .1403(b) to be eligible for funding.

Authority G.S. 143-323; 143B-10; 42 U.S.C.A. 5301; 24 C.F.R. 570.489.

.1403 SELECTION CRITERIA

(a) Projects will be evaluated against four selection criteria as follows:

(1) The percentage of CDBG funds directly benefiting low- and moderate-income persons;

(2) The CDBG cost per proposed job;

(3) The ratio of the amount of non-CDBG investment in the proposed project to the amount of CDBG funds in the proposed project, and

(4) The local conditions and impact includ-

ing:

(A) county unemployment;

(B) project wages;

(C) number of project jobs; and

(D) property tax.

(b) An applicant must meet at least one of three levels of requirements to be eligible for funding as follows:

(1) meet the Level One requirements for all four criteria;

(2) meet the Level Two requirements for three of the four criteria; or

(3) meet the Level Three requirements for two of the four criteria.

(c) Projects will be selected for funding from those projects which meet one of the requirement levels in Paragraph (b) of this Rule based on the availability of funds and overall project quality. Project quality will be determined by the Department based upon the following factors:

(1) the extent to which the project exceeds the requirements in levels one, two, or three;

(2) the demonstrated need for and appropriateness of funding;

(3) the probability of success of the project as described in financial statements and other information submitted with the application; and

(4) significant local economic problems.

Authority G.S. 143-323; 143B-10; 42 U.S.C.A. 5304(a)(1); 24 C.F.R. 570.489.

.1404 PRELIMINARY AWARDS

The Department shall announce preliminary grant awards after review and evaluation of Economic Development applications. A grant agreement shall not be extended by the Department to a locality until a legally binding commitment with the participating private entity has been executed, and approved by the Department. The legally binding commitment shall incorporate project specific implementation requirements reflecting key project elements including, as appropriate but not limited to, dates for real estate closings, orders for equipment, start of construction, start of hiring, and possible repayment obligations. The legally binding commitment must be submitted to and approved by the Department within 90 days of the preliminary award announcement. A preliminary award may be withdrawn by the Department if the legally binding commitment is not approved by the Department within the 90-day period. If a locality receiving a preliminary award demonstrates that

special circumstances warrant, the Department may grant an extension of time for executing the legally binding commitment subject to acceptable assurances and a timetable from all parties involved. In no case shall the time for executing a legally binding commitment exceed six months from the preliminary grant award date.

statutory Authority G.S. 143-323; 143B-10; 42 U.S.C.A. 5301.

405 SELECTION CRITERIA - SMALL BUSINESS LOAN PROGRAM

(a) Projects must meet the minimum standards established under each of the following criteria:

- (1) The percentage of CDBG funds directly benefitting low-and moderate-income persons;
- (2) The CDBG cost per proposed job created, and
- (3) The ratio of the amount of non-CDBG investment in the proposed project to the amount of CDBG funds in the proposed project.

(b) Projects which meet the standards established in (a) of this Rule will be selected based upon the following criteria:

- (1) The extent to which the project exceeds the minimum standards outlined in Rule .1405(a);
- (2) The demonstrated need for and appropriateness of funding;
- (3) The probability of success of the project as described in the financial statements and other information submitted with the application; and
- (4) Significant local economic problems.

uthority G.S. 143-323; 42 U.S.C.A. 5301; 24 F.R. 570.489.

TITLE 7 - DEPARTMENT OF CULTURAL RESOURCES

Notice is hereby given in accordance with G.S. 50B-21.2 that the USS North Carolina Battleship Memorial intends to amend rule cited as 7 NCAC .0203.

The proposed effective date of this action is January 1, 1993.

The public hearing will be conducted at 10:00 am on Friday, September 4, 1992 at the Admiral's Cabin, USS NORTH CAROLINA Battleship Memorial, Eagle Island, Wilmington, NC.

Reason for Proposed Action: To establish a permanent price structure increase for admission to the Battleship Memorial.

Comment Procedures: Data, opinion and arguments concerning this rule must be submitted by September 4, 1992 to the Director, USS NORTH CAROLINA Battleship Memorial, P.O. Box 417, Wilmington, NC 28402.

CHAPTER 5 - U.S.S. NORTH CAROLINA BATTLESHIP COMMISSION

SECTION .0200 - USE REGULATIONS

.0203 ADMISSION PRICES

(a) The admission price for the Battleship U.S.S. North Carolina is six dollars (\$6.00) five dollars (\$5.00) for adults age 12 and over, three dollars (\$3.00) two dollars and fifty cents (\$2.50) for children age 6 through 11, one dollar and fifty cents (\$1.50) one dollar and twenty-five cents (\$1.25) per student for organized school groups in grades kindergarten through 6, and three dollars (\$3.00) two dollars and fifty cents (\$2.50) per student for organized school groups in grades 7 through 12.

(b) There is no charge for children under 6.

(c) Classroom teachers, aides, and chaperones accompanying students in class field trips will be admitted without charge at the rate of 1 teacher/aide/chaperone for each 20 students.

(d) Tour groups under auspices of bona fide travel agents will be offered a 20 percent discount. Tour directors and drivers will be admitted without charge.

(e) Any organized groups of 20 or more will be offered a 10 percent discount when tickets are purchased by a single source.

Statutory Authority G.S. 143B-73.

TITLE 10 - DEPARTMENT OF HUMAN RESOURCES

Notice is hereby given in accordance with G.S.

150B-21.2 that the Social Services Commission Division of Social Services intends to amend rule cited as 10 NCAC 35D .0201 and 10 NCAC 47B .0305.

The proposed effective date of this action is November 1, 1992.

The public hearing will be conducted at 10:00 a.m. on September 2, 1992 at the Division of Social Services, 9th Floor Conference Room, Albemarle Bldg., 325 North Salisbury Street, Raleigh, North Carolina 27603.

Reason for Proposed Action:

10 NCAC 35D .0201 - To reduce unnecessary paperwork by allowing counties to use form DSS-5094 (Child Placement Information Tracking System) in lieu of Service Client Application.

10 NCAC 47B .0305 - Clarify in the current APA rule that SCD clients are not eligible to receive SCD and Medicaid in the same month.

Comment Procedures: Comments may be presented in writing anytime before or at the public hearing or orally at the hearing. Time limits for oral remarks may be imposed by the Commission Chairman. Any person may request copies of this rule by calling or writing to Donna Creech, Division of Social Services, 325 North Salisbury Street, Raleigh, North Carolina 27603, (919) 733-3055.

CHAPTER 35 - FAMILY SERVICES

SUBCHAPTER 35D - CONDITIONS FOR PROVISION OF SERVICES

SECTION .0200 - APPLICATION FOR SOCIAL SERVICES

.0201 APPLICATION REQUIREMENT

All applicants for social services must initiate entry into the social services system via a written application except that no application shall be required for the following:

- (1) protective services for adults;
- (2) protective services for children;
- (3) foster care service for children;
- (4) (3) employment program services.

Statutory Authority G.S. 143B-153.

CHAPTER 47 - STATE/COUNTY SPECIAL ASSISTANCE

SUBCHAPTER 47B - ELIGIBILITY DETERMINATION

SECTION .0300 - COVERAGE

.0305 CD-SA: CERTAIN DISABLED

CD-SA coverage shall be provided only for persons who are:

- (1) ~~Persons who have applied for SSI and been found ineligible~~ Ineligible and are not receiving SSI;
- (2) In need;
- (3) Not inmates of public institutions;
- (4) Not patients in institutions for mental disease;
- (5) Residing in North Carolina voluntarily with the intent to remain; and
- (6) U.S. citizens or aliens lawfully admitted for permanent residence; and
- (7) Not receiving Medicaid for the same month.

Statutory Authority G.S. 108A-25; 143B-153.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission Division of Social Services intends to adopt rule cited as 10 NCAC 42T .0006 and amend rule cited as 10 NCAC 35E .0309; 42T .0001, .0003.

The proposed effective date of this action is December 1, 1992.

The public hearing will be conducted at 10:00 a.m. on September 2, 1992 at the DSS 9th Floor Conference Room, Albemarle Building, 325 North Salisbury Street, Raleigh, North Carolina 27603.

Reason for Proposed Action: The adoption and amendment of these rules will simplify the administration of the service at the local level by having compatible rules for a variety of funding sources and administrative auspices, as called for by H.B. 1008 and the Advisory Committee on Home and Community Care.

Comment Procedures: Comments may be presented in writing anytime before or at the public hearing or orally at the hearing. Time limits for oral remarks may be imposed by the Commission Chairman. Any person may request copies of this rule by calling or writing to Donna Creech, Division of Social Services, 325 North Salisbury Street, Raleigh, North Carolina, (919) 733-3055.

CHAPTER 35 - FAMILY SERVICES

SUBCHAPTER 35E - SOCIAL SERVICES BLOCK GRANT (TITLE XX)

SECTION .0300 - SERVICE DEFINITIONS

0309 HOUSING AND HOME IMPROVEMENT SERVICES

(a) Primary Service. ~~Housing and home improvement services means assistance to individuals and families in obtaining and retaining adequate housing and basic furnishings. Services include helping to improve landlord tenant relations, to identify sub standard housing, to secure correction of housing code violations, to obtain or retain ownership of own home, and to find and relocate to more suitable housing.~~

(b) Components. ~~None.~~

(c) Resource items:

(1) ~~the provision of labor and materials for minor renovations and repairs to owner-occupied dwellings to remedy conditions which are a risk to personal health and safety may be included as an optional part of this service;~~

(2) ~~basic appliances, such as stove, refrigerator, heater, fan, or air conditioner may also be provided at county option to facilitate the provision of housing and home improvement services. Such appliances may be provided when this is not the responsibility of the landlord and the individual lacks these essentials to prepare food or is without heat or cooling equipment which is needed to protect their health.~~

(d) Target Population. ~~Individuals or families needing to obtain or retain adequate housing or basic furnishings. Within the target population, eligible clients shall be provided housing and home improvement services in the following order of priority:~~

(1) ~~aged or disabled adults and children who need the service to avoid impen-~~

~~ing placement in substitute care (e.g. nursing home, domiciliary home, foster home), and abused or neglected adults and children who need the service as part of a protective services plan;~~

(2) ~~aged or disabled adults who need the service to safeguard their functioning and to maintain personal health and safety in their own homes;~~

(3) ~~children who need the service as part of a plan of preventive services designed to strengthen the family and preserve the home for the child, or as a part of permanency planning to enable a child to return home from substitute care.~~

(a) Primary Service. ~~Housing and home improvement services means assistance to individuals and families in obtaining or retaining adequate housing and basic furnishings or appliances, or both. The service has three distinct elements:~~

- (1) ~~Provision of counseling, advocacy and training to individuals or to groups;~~
- (2) ~~Provision of labor and materials for minor renovations and repairs to dwellings to remedy conditions which are a risk to the personal health and safety of individuals or families or to enhance mobility for functionally impaired individuals; and~~
- (3) ~~Provision of basic furnishings or appliances, or both, to remedy deficiencies which pose a risk to the basic health and safety of individuals and families.~~

(b) Components. ~~None.~~

(c) Resource Items. ~~None.~~

(d) Target Population. ~~Individuals or families needing one or more elements of the service, such as counseling, advocacy, training, renovations or repairs to dwellings, or basic furnishings or appliances, to obtain or retain adequate housing that enables them to remain in, or return to, their own homes and alleviates risk to their personal health and safety. Persons acting on behalf of an eligible client may be allowed to access the service. Within the target population eligible clients must be served in the following order of priority:~~

- (1) ~~adults and children for whom the need for protective services has been substantiated and the service is needed as part of a protective services plan;~~
- (2) ~~adults who are at risk of abuse, neglect or exploitation and children who are at risk of abuse, neglect, or dependency;~~
- (3) ~~adults with extensive ADL or IADL impairment who are at risk of place-~~

ment in substitute care and children who are at risk of placement in substitute care;

(4) children who need the service as part of a plan of preventive services designed to strengthen the family and preserve the home for the child, or as part of permanency planning to enable a child to return home from substitute care; and adults with three or more ADL or IADL impairments;

(5) adults with one or two ADL or IADL impairments.

Statutory Authority G.S. 143B-153.

CHAPTER 42 - INDIVIDUAL AND FAMILY SUPPORT

SUBCHAPTER 42T - HOUSING AND HOME IMPROVEMENT SERVICES

.0001 DEFINITIONS

(a) The definition of housing and home improvement services is set forth in 10 NCAC 35E .0309.

(b) "Obtaining" under this service includes location of and negotiation for adequate housing or basic furnishings and arranging for relocation to other housing or for the movement of basic furnishings.

(c) "Retaining" under this service includes negotiation with individuals who have influence over or control of the client's ability to continue keeping his abode or his basic furnishings.

(d) "Adequate Housing" means a dwelling that is lawfully and reasonably sufficient to meet the needs of the client and his family.

(e) "Basic Furnishings" includes essential household items.

(f) "Owner Occupied Dwelling" means an abode in which the service recipient resides and over which the service recipient retains title. This includes an abode over which the individual has title through the provision of a life estate.

(g) "Basic Appliances" includes items necessary for refrigerating or preparing food, or heating or cooling the home.

(h) "Minor Renovations and Repairs" includes restoration of the dwelling so as to lessen risks to personal health and safety without including any structural change to the dwelling.

(a) "Activities of Daily Living (ADL)" include eating; dressing; bathing; toileting; bowel and bladder control; transfers; ambulation; and communication such as speaking, writing, signing,

gestures, and using communication devices.

(b) "Adequate housing" means a dwelling that is lawfully and reasonably sufficient to meet the needs of the individual or family.

(c) "Advocacy" means efforts on behalf of individuals or families who require assistance with accessing or obtaining community services and supports.

(d) "Area of Repair" means the room or section of the home needing modification, such as the roof or bathroom.

(e) "Basic appliances" means items that are necessary for refrigerating or preparing food, or heating or cooling the home.

(f) "Basic furnishings" means essential household items.

(g) "Instrumental Activities of Daily Living (IADL)" include meal preparation, medication intake, cleaning, money management, phone use, laundering, reading, writing, shopping and going to necessary activities.

(h) "Minor renovations and repairs" mean restoration of the dwelling so as to lessen risks to personal health and safety without including any structural change to the dwelling.

(i) "Obtaining" means location of and negotiating for adequate housing or basic furnishings and arranging for relocation to other housing or for the movement of basic furnishings.

(j) "Own home" means that the individual or family is living in a residence maintained by him or them, or is maintained for him or them by caretaker. "Own home" does not include an group care.

(k) "Retaining" under this service means negotiating with individuals who have influence over or control of the individual's ability to continue keeping his abode or his basic furnishings.

Statutory Authority G.S. 143B-153.

.0003 METHODS OF SERVICE PROVISION

(a) Direct Provision and Cash Payment Methods

(1) Any of the elements of housing and home improvement services may be provided directly by staff of the county departments of social services.

(2) Basic appliances and labor and materials for minor renovations or repairs to owner occupied dwellings may be provided by direct payment from the county department of social services to the services to the service provider or by cash payment from the department of social services to the service recipient.

Where the cash payment method is used for providing these resource items the following procedures apply:

- (A) The county department of social services must determine that the service recipient is capable of arranging for and obtaining quality service for himself.
- (B) The county director or his designee must authorize the purchase of a basic appliance or minor renovations and repairs, at an approved cost, prior to the provision of the service and document this in the service record.
- (C) A receipt showing the description of the service provided, the date the service was provided, the name and address of the service provider, the amount paid for the service, the date of payment from the recipient to the provider of the service and the signature of the provider or the individual receiving payment in his behalf must be given to the county department prior to a request for federal financial participation in reimbursement.
- (3) The costs of labor or material or both needed for renovations and repairs to the homes of eligible individuals are allowable under the following circumstances:
 - (A) The renovations or repairs do not include any structural change and costs are limited to a maximum of five hundred dollars (\$500.00) for labor or materials or both per area of repair, e.g., roof, bathroom; and
 - (B) The costs are reasonable and necessary while providing quality work; and
 - (C) The condition of the home is such that minor renovations or repairs can make the dwelling safe and healthy for the occupants; and
 - (D) The dwelling is owner occupied.
- (4) The cost of new or used basic appliances is allowable provided that the condition of the appliances meets the needs of the individual or family.
- (b) Purchase of Service Contract. The elements of obtaining and retaining adequate housing and basic furnishings as well as the provision of labor and materials for minor renovations and repairs to owner occupied dwellings may be purchased under contract. Basic appliances cannot be provided as part of a contract for housing and home improve-

ment services.

Housing and Home Improvement Services may be provided directly by the county department of social services or may be purchased.

Statutory Authority G.S. 143B-153.

.0006 SERVICE DELIVERY

(a) Renovations and repairs to renter occupied dwellings may be provided only when this is not the responsibility of the landlord.

(b) Basic furnishings or appliances, or both, may be provided to residents of renter occupied dwellings only when such items are not the responsibility of the landlord.

(c) Reimbursement is available for the cost of salary, fringe benefits and other administrative costs associated with the provision of Housing and Home Improvement Services.

(d) Reimbursement is available for the costs of labor or materials, or both, needed for renovations and repairs to the homes of eligible individuals under the following circumstances:

- (1) the renovations or repairs are minor and do not include any structural change; reimbursements are limited to a maximum of eight hundred dollars (\$800.00) for labor and materials per area of repair; and
- (2) the costs are reasonable and necessary; and
- (3) the condition of the home is such that minor renovations or repairs will make the dwelling safe and healthy for the occupants.

(e) Reimbursement is available for the purchase of new or used basic furnishings or appliances as long as they are in such condition that they meet the needs of the individual.

Statutory Authority G.S. 143B-153.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the Division of Facility Services (Social Services Commission) intends to amend rule cited as 10 NCAC 42C .3402.

The proposed effective date of this action is November 1, 1992.

The public hearing will be conducted at 10:00

a.m. on September 9, 1992 at the Albemarle Building, 325 North Salisbury Street, Raleigh, North Carolina.

Reason for Proposed Action: Rule change is recommendation of the Domiciliary Home Licensure Program Rules Review Committee to make the time frame for submitting the Annual Recommendation for Renewal of License (DSS-1871) consistent with the 45 day requirement set forth in the Domiciliary Home Procedures Manual.

Comment Procedures: Comments may be presented in writing any time before or at the public hearing or orally at the hearing. Time limits for oral remarks may be imposed by the Commission Chairman. Any person may request copies of this rule by calling or writing to Donna Creech, Division of Social Services, 325 North Salisbury Street, Raleigh, North Carolina 27611. Telephone (919) 733-3055.

CHAPTER 42 - INDIVIDUAL AND FAMILY SUPPORT

SUBCHAPTER 42C - LICENSING OF FAMILY CARE HOMES

SECTION .3400 - LICENSING INFORMATION

.3402 RENEWAL OF LICENSE

(a) The license will be renewed annually on evidence that:

- (1) The rules of this Subchapter are being maintained. When violations of these Rules are documented and have not been corrected prior to expiration of license, the Division of Facility Services may approve a continuation or extension of a plan of correction, or may issue a provisional license or revoke the license for cause.
- (2) The following reports have been submitted to the county department of social services with 12-month period which will forward them to the Division of Facility Services:
 - (A) Documentation of necessary tests for tuberculosis;
 - (B) Record of continuing education credits for each administrator and supervisor-in-charge;
 - (C) DSS-6191 or DSS-1451 (Fire and

Building Safety Inspection Report);
(D) DHS-2094 (Sanitation Report); and
(E) DSS-1871 (Annual Recommendation for Renewal of License).

This form is to be submitted by the county department of social services at least 30 days in advance of the expiration date of the license, with a copy to the administrator.

(b) If the Division of Facility Services has not received the DSS-1871 and the other required licensing materials listed in Subparagraph (a)(2) of this Rule by the expiration date, the license will expire.

Statutory Authority G.S. 131D-2; 143B-153.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission, Division of Facility Services intends to amend rule(s) cited as 10 NCAC 46C .0107; 46H .030; repeal rule(s) cited as 46C .0105; and adopt rule(s) cited as 46H .0110.

The proposed effective date of this action December 1, 1992.

The public hearing will be conducted at 10:00 a.m. on September 2, 1992 at the Albemarle Bldg DSS 9th Floor Conference Rm., 325 N. Salisbury St., Raleigh, NC 27603.

Reason for Proposed Actions:

10 NCAC 46C .0105, .0107 and 10 NCAC 46H .0110 - To comply with federal regulations, requested by MHDDSAS, and Child Day Care Committee of the NC Social Services Directors' Association to provide consistency among state programs.

10 NCAC 46H .0304 - To eliminate confusion about which child is charged the full fee.

Comment Procedures: Comments may be presented in writing any time before or at the public hearing or orally at the hearing. Time limits for oral remarks may be imposed by the Commission Chairman. Any person may request copies of the Rules by calling or writing to Donna Creech, Division of Social Services, 325 N. Salisbury Street, Raleigh, NC 27611, (919) 733-3055.

CHAPTER 46 - DAY CARE RULES

SUBCHAPTER 46C - PURCHASE OF CHILD DAY CARE

SECTION .0100 - BASIC REQUIREMENTS

.0105 SPECIAL NEEDS SUPPLEMENTAL RATE

(a) Any approved provider of daily care may be eligible for a supplemental rate equal to 10 percent the provider's payment rate under the following conditions:

- (1) the service population of the child day care center or home is comprised of at least 60 percent children without special needs and the center or home provides services to a child or children with special needs;
- (2) the provider's rate for a child shall not exceed 10 percent of the provider's approved daily care rate for that age group;
- (3) the agency determining eligibility for the service has on file a signed letter, statement, or summary from the person authorized to make the diagnosis to document the "special need" condition and a summary of the special services required to meet the child's needs.

(b) A "special needs" child is one who is determined by the appropriate authorities, as identified in 16 NCAC 6H and 10 NCAC 37F and Subparagraph (4) of this Rule, to qualify under one or more of the criteria listed in this Paragraph:

- (1) child recipient of SSI (Supplemental Security Income);
- (2) special needs child as defined in accordance with Department of Public Instruction's rules in 16 NCAC 6H .0001;
- (3) a mentally retarded or severely physically disabled child under criteria found in 10 NCAC 37F .0004;
- (4) a "high risk" infant defined as a child from birth to 3 years of age who exhibits significantly atypical patterns of behavior that indicate a high probability of mental retardation. The condition of high risk must be determined by a physician, who may secure corroborating evidence from a practicing psychologist or a psychological associate under the supervision of a practicing psychologist.

.0107 RATES FOR SUBSIDIZED CARE

(a) The payment rate for centers in which fewer than 50 percent of the children enrolled are subsidized with state or federal funds shall be the same fee paid by private paying parents for a child in the same age group in the same center, including registration fees. The payment rate for daily transportation provided by these centers is the same fee paid by a private paying parent for transportation of a child to or from the center.

(b) Centers in which 50 percent or more of the children enrolled are subsidized with state or federal funds may choose annually one of the following options:

- (1) the center's payment rates for care and transportation for state fiscal year 1985 -86; or
- (2) the county market rate for care calculated pursuant to the annual appropriations act and the state payment rate for transportation.

(c) Centers Facilities, as defined in G.S. 110-86(3), which primarily serve children who are mentally or physically handicapped, cerebral palsied, autistic, or abused or neglected pursuant to G.S. 7A-544, meet the definition of special needs set forth in 10 NCAC 46H .0110 are exempt from the provisions of Paragraphs (a) and (b) of this Rule and may choose annually one of the following payment options:

- (1) the maximum rates established by the Division of Mental Health/Developmental Disabilities/Substance Abuse Services for developmental day centers; or
- (2) the center's allowable unit cost per child established annually by the section according to the Division of Mental Health/Developmental Disabilities/Substance Abuse Services allowable cost policy, and the rate establishment procedures approved by the secretary pursuant to G.S. 143B-153(2 a).

(d) Any approved day care provider who provides care to children who meet the definition of special needs set forth in 10 NCAC 46H .0110, but who does not primarily serve special needs children, may be paid a supplemental rate up to 75% above the provider's approved daily care rate for a particular age group and shall be subject to the following conditions:

- (1) the maximum payment rate shall not exceed the maximum rate established for developmental day centers by the Division of Mental Health/Developmental Disabilities/Substance Abuse Servic-

Statutory Authority G.S. 143B-153(2a).

es; and

(2) the service population of the child day care facility or home is comprised of at least 60% children without special needs and the facility or home provides services to a child or children with special needs. The 60% rule does not apply to home-based arrangements where the number of children enrolled exempts them from state regulation.

(c)(d) Except as provided for in Paragraph (a), the payment rate for registration fees shall be limited to twenty dollars (\$20.00) per year per child.

(f)(e) Purchasing agencies may negotiate with day care center providers for purchase of child day care services at payment rates lower than those prescribed by this Rule.

(g) Child day care services funds shall not be used to pay for services provided by the Department of Human Resources, Division of Mental Health/Developmental Disabilities/Substance Abuse Services or the Department of Public Instruction, Division of Exceptional Children's Services.

Statutory Authority G.S. 143B-153(8)a.

SUBCHAPTER 46H - POLICIES FOR PROVISION OF CHILD DAY CARE SERVICES

SECTION .0100 - GENERAL POLICIES

.0110 SCOPE

(a) A special needs child is one who is determined by the appropriate authorities to qualify under one or more than one of the criteria listed in this Paragraph:

(1) a child who is determined by the area mental health/developmental disabilities/substance abuse program to meet the definition of special needs pursuant to G.S. 122C and codified in 10 NCAC 14K .0103(c) (11), (24), and (40); including subsequent amendments; or

(2) a child who is determined by the local educational agency (LEA) to meet the definition of special needs as defined in the Department of Public Instruction's "Procedures Governing Programs and Services for Children With Special Needs", codified in 1501A (2)-(13).

(b) The agency determining eligibility for the services has on file a signed letter, statement, or

summary from the person authorized to make the diagnosis to document the "special need" condition and a summary of the special services required to meet the child's needs as outlined in the child individualized plan. An individualized plan required to be developed by the area mental health program or the local educational agency for every child who is determined to meet the definition of a special needs child pursuant to PL 99-457, G.S. 122C-3 and G.S. 115C-146.1.

(c) Eligibility for the supplemental rate shall be contingent upon the provider's compliance with the activities designated for the provider in the child individualized plan.

Statutory Authority G.S. 143B-153(2a).

SECTION .0300 - CLIENT FEES FOR CHILD DAY CARE SERVICES

.0304 ADJUSTMENTS IN FEES

(a) When child day care services are provided to more than one member of the same family, the parent shall be charged the full fee for the first youngest child enrolled full time. The fee charge for each additional child shall be fifty percent of the fee for the first child.

(b) If family medical expenses exceed ten percent of the family's gross income in any eligibility period, the amount of the expenses which exceed the gross income shall be deducted from the gross income. The reduced income shall be used to determine the amount of the fees to be assessed the family for child day care services.

(c) When the approved care plan is for less than full-day care, the assessed fee for the service is adjusted by the appropriate percentage relative to the approved care plan.

Statutory Authority G.S. 143B-153.

TITLE 12 - DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Private Protective Service Board intends to adopt rule cited as 12 NCAC 7 .0906.

The proposed effective date of this action November 2, 1992.

The public hearing will be conducted at 12:00

.m. on August 18, 1992 at the State Bureau of Investigation, Conference Room, 3320 Old Garner Road, Raleigh, NC 27626-0500.

Reason for Proposed Action: Requires a certified firearms trainer to maintain an armed certification file for each trainee.

Comment Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments until September 2, 1992. Written comments must be delivered to or mailed to: James F. Kirk, Private Protective Services Board, 3320 Old Garner Rd., P.O. Box 29500, Raleigh, N.C. 27626.

CHAPTER 7 - PRIVATE PROTECTIVE SERVICES

SUBCHAPTER 7D - PRIVATE PROTECTIVE SERVICES BOARD

SECTION .0900 - FIREARMS TRAINER CERTIFICATE

0906 RECORDS RETENTION

A Certified Firearms Trainer shall retain the following in the individual's armed certification file:

- (1) a copy of the summary sheet listing the name(s) of individual(s) qualifying for armed security guard registration, and hour(s) of training, weapon qualification scores and any other information thereon; and
- (2) a copy of the individual's Firearm Training Certificate; and
- (3) the individual's B-27 target; or
- (4) the Certified Firearms Trainer's Documentation Record.

Statutory Authority G.S. 74D-5.

* * * * *

Notice is hereby given in accordance with G.S. 50B-21.2 that the N.C. Alarm Systems Licensing Board intends to amend rule(s) cited as 12 NCAC 1 .0301.

The proposed effective date of this action is November 2, 1992.

The public hearing will be conducted at 11:00 a.m. on August 18, 1992 at the State Bureau of Investigation, Conference Room, 3320 Old Garner Road, Raleigh, NC 27626-0500.

Reason for Proposed Action: To require an employer to submit a Certification of the Background and Criminal Record Check for each applicant and to maintain a copy of the Certification in each employee's file.

Comment Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments until September 2, 1992. Written comments must be delivered to or mailed to: James F. Kirk, NC Alarm Systems Licensing Board, 3320 Old Garner Rd., P.O. Box 29500, Raleigh, NC 27626-0500.

CHAPTER 11 - N.C. ALARM SYSTEMS LICENSING BOARD

SECTION .0300 - PROVISIONS FOR REGISTRANTS

.0301 APPLICATION FOR REGISTRATION

(a) Each employer or his designee shall submit and sign an application form for the registration of his employee on a form provided by the Board. This form, when sent to the board, shall be accompanied by a set of classifiable fingerprints on a standard F.B.I. applicant card, two recent photographs of acceptable quality for identification one inch by one inch in size, statements of the results of a local criminal history records search by the city-county identification bureau or clerk of superior court in each county where the applicant has resided within the immediate preceding 48 months and the registration fee required by 12 NCAC Chapter 11 .0302.

(b) The employer of an applicant who is currently registered with another alarm business, shall complete an application form provided by the Board. This form shall be accompanied by the applicant's multiple registration fee.

(c) The employer of each applicant for registration shall retain a copy of the applicant's application in the individual applicant's personnel file in

the employer's office.

(d) The employer of each applicant for registration shall complete and submit to the Board a certification of the background and criminal record check of every applicant signed by the licensee and/or qualifying agent. A copy of this certification shall be retained in the individual applicant's personnel file in the employer's office.

Statutory Authority G.S. 74D-5; 74D-8.

TITLE 15A - DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the DEHNR - Sedimentation Control Commission intends to amend rule(s) cited as 15A NCAC 4D .0003.

The proposed effective date of this action is December 1, 1992.

Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice): Any person(s) requesting that the Commission hold a public hearing on the proposed rule must submit such a request in writing within 15 days after publication of the notice. The request must be submitted to: Mr. Craig Deal, DEHNR, Land Quality Section, P.O. Box 27687, Raleigh, NC 27611. Written requests for hearing must be received no later than 5:00 p.m. on August 18, 1992.

Reason for Proposed Action: To delete Subparagraphs (a) and (c) which are provisions for revising local ordinances. These provisions are inconsistent with current policy of the Sedimentation Control Commission.

Comment Procedures: Interested persons may contact Mr. Craig Deal at (919) 733-4574 for more information regarding this Rule. Written comments will be received for 30 days after publication of the notice. Written comments must be submitted to Mr. Craig Deal, DEHNR, Land Quality Section, P.O. Box 27687, Raleigh, NC 27611. Written comments must be received no later than 5:00 p.m. on September 2, 1992.

CHAPTER 4 - SEDIMENTATION

CONTROL

SUBCHAPTER 4D - LOCAL ORDINANCES

.0003 REVISIONS TO APPROVED LOCAL ORDINANCES

~~(a) The Commission shall revise the model ordinance as necessary and shall provide such revisions to all approved local programs within 30 days of the date of revision. Each local government shall incorporate said revisions in its local ordinance within eight months following the receipt. If local ordinance standards and provisions meet or exceed the required revisions the local government shall notify the Commission within 90 days of their receipt.~~

~~(b) The Commission shall only approve revision upon determining that such revisions equal or exceed the standards of the model ordinance and have been adopted locally.~~

~~(c) The Commission shall review draft revision undertaken by a local government within 60 days of their receipt and shall notify the local government of their adequacy or of any necessary corrections.~~

Statutory Authority G.S. 113A-54(d); 113A-60.

TITLE 15A - DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Environment, Health, and Natural Resources - Governor's Waste Management Board intends to amend rule(s) cited as 15A NCAC 14A .0502, .0512.

The proposed effective date of this action is November 2, 1992.

The public hearing will be conducted at 3:00 p.m. on August 20, 1992 at the Dobbs Building, Room 2115, 430 N. Salisbury Street, Raleigh, North Carolina.

Reason for Proposed Action: To make minor technical corrections to the Governor's Waste

management Board's existing rules of procedure or implementing the limited preemption process.

Comment Procedures: Interested persons may contact Dr. Linda W. Little at (919) 733-9020 for more information regarding these Rules. Written comments will be received for 30 days after publication of this notice. The request must be submitted to: Dr. Linda W. Little, GWMB, P.O. Box 27687, Raleigh, NC 27611-7687. Mailed written comments must be received no later than 12:00 p.m. September 2, 1992.

CHAPTER 14 - GOVERNOR'S WASTE MANAGEMENT BOARD

SUBCHAPTER 14A - RULES OF PROCEDURE FOR IMPLEMENTING THE LIMITED PREEMPTION PROCESS

SECTION .0500 - PREEMPTION PROCESS: HAZARDOUS WASTE FACILITY

502 DEFINITIONS

As used in these Rules:

- (1) "Board" means the Governor's Waste Management Board established pursuant to Part 27 of Article 3 of Chapter 143B of the General Statutes.
- (2) "Chairman" means the Chairman of the Board.
- (3) "City" means a municipal corporation defined by G.S. 160A-1.
- (4) "Commission" means the North Carolina Hazardous Waste Management Commission established pursuant to Chapter 130B of the General Statutes.
- (5) "County" means any one of the counties listed in G.S. 153A-10.
- (6) "Days" means calendar days.
- (7) "Facility" means a hazardous waste facility authorized by the Governor as provided in G.S. 130B-5(a) and G.S. 130B-5(b) (1), either proposed, under construction, or operational. defined by G.S. 130A-290(9).
- (8) "File" or "Filing" means to place the paper or item to be filed into the care and custody of the Executive Director of the Board and acceptance thereof by him. All documents filed with the Board, except exhibits, shall be in letter size 8 1/2" by 11".
- (9) "Non-party" means any person who is not

- (10) a party.
- (11) "Operator" means a private operator or the Hazardous Waste Management Commission or a person employed by the Hazardous Waste Management Commission pursuant to G.S. 130B-7.
- (12) "Ordinance" means a local ordinance, resolution or other action by a county, city, town or other unit or agency of local government including health, environmental or land use regulations, taxes, fees or charges.
- (13) "Party" means the person who submits a petition, or the city or county that adopted the ordinance that is the subject of the petition.
- (14) "Person" means an individual; corporation; company; association; partnership; unit of government, agency, authority or commission at the local, state or federal level; or other legal entity.
- (14) "Service" or "Serve" means personal delivery or, unless otherwise provided by law or rule, delivery by first class United States Postal Service mail or a licensed overnight express mail service, postage prepaid and addressed to the party at his or her last known address. Service on the Board means personal delivery by first class United States Postage Service mail or a licensed overnight express mail service, postage prepaid and addressed to the Executive Director, Governor's Waste Management Board, P.O. Box 27687, Raleigh, N.C. 27611-7687. A Certificate of Service by the person making the service shall be appended to every document requiring service under these rules. Service by mail or with licensed overnight express mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, with sufficient postage affixed, in an official depository of the United States Postal Service or upon delivery, postage prepaid and wrapped in a wrapper addressed to the person to be served, to an agent of the overnight express mail service.

Statutory Authority G.S. 130A-293; 143B-216.13 (14).

.0512 APPEAL OF BOARD'S DECISION

The decision of the Board may be appealed in

accordance with G.S. 130A-293(e) (e).

Statutory Authority G.S. 130A-293; 143B-216.13 (14).

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Wildlife Resources Commission intends to amend rule(s) cited as 15A NCAC 10F .0323, with changes from the proposed text noticed in the Register, Volume 7, Issue 6, pages 556.

The proposed effective date of this action is December 1, 1992.

Comment Procedures: Interested persons may present their views in writing from August 3, 1992 to September 2, 1992. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 N. Salisbury Street, Raleigh, NC 27604-1188.

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY

SECTION .0300 - LOCAL WATER SAFETY REGULATIONS

.0323 BURKE COUNTY

(a) Regulated Areas. This Rule applies only to the following lakes or portions of lakes which lie within the boundaries of Burke County:

- (1) Lake Hickory;
- (2) Lake James;
- (3) Lake Rhodhiss.

(b) Speed Limit Near Ramps. No person shall operate a vessel at greater than no-wake speed within 50 yards of any marked public boat launching ramp, bridge, marina, boat storage structure, boat service area, dock or pier while on the regulated areas described in Paragraph (a) of this Rule or within 50 yards of any designated private boat launching ramp, bridge, marina, boat storage structure, boat service area, dock or pier around the Holiday Shores Subdivision on Lake James or within 50 yards of the Lake James Campground.

(c) Speed Limit in Mooring Areas. No person shall operate a vessel at greater than no-wake

speed while within a marked mooring area established with the approval of the Executive Director, his representative, on the regulated areas described in Paragraph (a) of this Rule.

(d) Restricted Swimming Areas. No person operating or responsible for the operation of vessel shall permit it to enter any marked public swimming area established with the approval of the Executive Director, or his representative, on the regulated areas described in Paragraph (a) of this Rule, including the area within 50 yards of any designated private boat dock around the Holiday Shores Subdivision on Lake James.

(e) Placement and Maintenance of Markers. The Board of Commissioners of Burke County designated a suitable agency for placement and maintenance of the markers implementing this Rule, subject to the approval of the United States Coast Guard and the United States Army Corps of Engineers, if applicable. With regard to marking the regulated areas described in Paragraph (a) of this Rule, all of the supplementary standards listed in Rule .0301(g) of this Section shall apply.

Statutory Authority G.S. 75A-3; 75A-15.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. State Board of Cosmetic Art Examiners intends to adopt rule(s) cited as 21 NCAC 14L .0301 - .0302.

The proposed effective date of this action November 2, 1992.

The public hearing will be conducted at 1:00 p.m. on August 31, 1992 at the Grove Towers, Fifth Floor, 1110 Navaho Drive, Raleigh, NC 27609.

Reason for Proposed Action: To enact rules for teachers licensed in other states who wish to be licensed to teach in North Carolina.

Comment Procedures: The record shall be open for 30 days to receive written comments. Written comments should be received by the N.C. State Board of Cosmetic Art Examiners by August 2, 1992, to be considered as part of the hearing record. Comments should be addressed to Vicki R. Goudie, Executive Secretary, N.C. State Board

Cosmetic Art Examiners, 1110 Navaho Dr.,
Raleigh, N.C. 27609. Requests to speak must be in
writing and received by August 25, 1992 prior to
arising. Speaking time 10 minutes.

CHAPTER 14 - BOARD OF COSMETIC ART EXAMINERS

SUBCHAPTER 14L - COSMETIC ART TEACHERS

SECTION - .0300 - TEACHERS LICENSED IN OTHER STATES

301 APPLICANTS LICENSED AS TEACHERS IN OTHER STATES

An individual who is licensed as a teacher in other state may be licensed as either a cosmetology teacher or a manicurist teacher in this State without examination if the individual makes application on a form provided by the Board, shows the satisfaction of the Board that the individual meets the requirements of Rule .0302 of this section, and has paid the fees required in Rule 214 of this Subchapter. The Board will not issue cosmetology teacher's license under this Rule to anyone who has failed the N.C. cosmetology teacher's examination within the past three years, or N.C. manicurist teacher's license to any one who has failed the manicurist teacher's examination within the past three years, and was subsequently licensed in another state.

Statutory Authority: G.S. 88-23.

302 REQUIREMENTS FOR OBTAINING A TEACHER'S LICENSE

(a) All applicants for any teacher's license under Rule .0301 of this Section shall present evidence to the Board that the applicant:

- (1) Currently holds a valid teacher's license in another state, issued by the state agency that licenses teachers in the field of cosmetic art;
- (2) is not the subject of a disciplinary proceeding or an unresolved complaint;
- (3) has a high school diploma or a high school graduation equivalency certificate; and
- (4) within the last three years, has worked as a teacher in a cosmetic art school in the state of licensure, or in a different state other than North Carolina where the applicant was also licensed as a teacher, for a period equivalent to one

year of full-time work.

If the applicant has ever been subjected to discipline by a licensing agency or had a complaint to a licensing agency resolved against the applicant, the applicant must submit to the Board information about the nature and details of the complaint and the action taken by the licensing agency.

(b) An applicant for a license under Rule .0301 of this Section as a cosmetology teacher shall present evidence to the Board that the applicant:

- (1) has, or has applied to the Board for and is entitled to, a license as a registered cosmetologist in this State;
- (2) has either:
 - (A) practiced cosmetology in a cosmetic art shop for a period equivalent to five years of full-time work; or
 - (B) completed an 800-hour teacher training course in cosmetology approved by the state that issued the applicant's teacher's license and practiced cosmetology in a cosmetic art shop for a period equivalent to six months of full-time work; and
- (3) has passed a teacher's examination consisting of a practical skills demonstration and The National Written Cosmetology Teacher's Examination given by that state's licensing body.

(c) An applicant for a license under Rule .0301 of this Section as a manicurist teacher shall present evidence to the Board that the applicant:

- (1) has, or has applied to the Board for and is entitled to, a license as a registered manicurist in this State;
- (2) has either:
 - (A) practiced manicuring in a cosmetic art shop for a period equivalent to five years of full-time work; or
 - (B) completed a 320-hour teacher training course in manicuring approved by the state that issued the applicant's teacher's license and practiced manicuring in a cosmetic art shop for a period equivalent to six months of full-time work; and
- (3) has passed a teacher's examination consisting of a practical skills demonstration and The National Written Manicurist Teacher's Examination given by that state's licensing body.

Statutory Authority: G.S. 88-23.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Dietetics/Nutrition intends to adopt rule cited as 21 NCAC 17 .0016.

The proposed effective date of this action is November 2, 1992.

The public hearing will be conducted at 2:00 pm on August 21, 1992 at the Offices of Jordan, Price, Wall, Gray & Jones, 200 Hillsborough Place, 225 Hillsborough Street, Raleigh, NC.

Reason for Proposed Action: To adopt rules governing the conduct of investigations and hearings.

Comment Procedures: Requests to make oral comments at the hearing must be received by 5:00pm on August 14, 1992; written comments must be received by the Board no later than 5:00pm on September 2, 1992. Comments should be limited to 10 minutes. Requests and comments should be addressed to the Executive Secretary, North Carolina Board of Dietetics/Nutrition, P.O. Box 11321, Department LB, Charlotte, NC 28220.

Editor's Note: This Rule was filed as a temporary adoption effective July 16, 1992 for a period of 180 days or until the permanent rule is effective, whichever is sooner.

CHAPTER 17 - NORTH CAROLINA BOARD OF DIETETICS/NUTRITION

.0016 VIOLATIONS, COMPLAINTS, SUBSEQUENT BOARD ACTION, AND HEARINGS

(a) The definitions contained in G.S. 150B-2 (1), (2), (2b), (4a), (4b), (5), (8), (8a), (8b) are adopted by reference within this Rule. In addition, the following definitions apply:

- (1) "Administrative Law Counsel" means an attorney whom the Board has retained to serve as procedural officer for contested cases.
- (2) "Prosecuting Attorney" means the attorney retained by the Board to prepare and prosecute contested cases.

(b) Before the North Carolina Board of Dietetics/Nutrition makes a final decision in any

contested case, the person, applicant or licensee affected by such decision will be afforded an administrative hearing pursuant to the provisions of Article 3A, Chapter 150B of the North Carolina General Statutes.

- (1) The paragraphs contained in this Rule shall apply to conduct of all contested cases heard before or for the North Carolina Board of Dietetics/Nutrition. The following general statutes, rules and procedures apply and are adopted by reference within this Rule, unless another specific statute or rule of the North Carolina Board of Dietetics/Nutrition provides otherwise: the Rules of Civil Procedure as contained in G.S. 1A-1, the Rules of Evidence pursuant to G.S. Chapter 8C; the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes and Canons 1, 2 and 3 of the Code of Judicial Conduct adopted in accordance with G.S. 7A-10.1.
(2) Every document filed with the Board shall be signed by the person, applicant, licensee, or the attorney who prepared the document, if it was prepared by an attorney, and shall contain his name, title/position, address, and telephone number. If the individual involved is a licensed dietitian/nutritionist, the license number shall appear on all correspondence with the Board. An original and one copy of each document shall be filed.

(c) Anyone may complain to the Board alleging that a person, applicant or licensee has committed an action prohibited by G.S. 90-350 through 90-369 or the rules of the Board.

- (1) A person wishing to complain about an alleged violation of G.S. 90-350 through 90-369 or the rules of the Board may notify the Executive Secretary. A complaint regarding the Executive Secretary, the staff or the Board may be directed to the chair of the Board or any Board member.
- (2) The initial notification of a complaint may be in writing, by telephone, or by personal visit to the Executive Secretary's office.
- (3) Upon receipt of a complaint, the Executive Secretary, unless the health and

safety of the public otherwise requires, shall send to the complainant an acknowledgement letter, and request the complainant complete and file a complaint form before further action can be taken.

(d) An Investigator and/or other authorized Board staff shall investigate a complaint and may take one or more of the following actions:

- (1) determine that an allegation is groundless and dismiss the complaint;
- (2) determine that the complaint does not come within the Board's jurisdiction, advise the complainant and, if possible, refer the complainant to the appropriate governmental agency for handling such complaints;
- (3) determine that a nonlicensed person has committed a prohibited action and take appropriate legal action against the violator;
- (4) determine that a licensee has violated the Act and/or the rules of the Board and propose denial of renewal of license, revocation or suspension of license, reprimand, or imposition of probationary conditions on a licensee.

(e) Whenever a complaint is dismissed or a complaint file closed, the Executive Secretary will give a summary report of the final action to the Board, the complainant, and the accused party.

(f) In accordance with G.S. 150B-3(c), a license may be summarily suspended if Board finds that the public health, safety, or welfare requires emergency action. Such a finding shall be incorporated with the order of the Board and the order shall be effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and shall continue to be effective during the proceedings. Failure to receive the order because of refusal of service or unknown address does not invalidate the order. Proceedings shall be commenced in a timely manner.

(g) The Board, through its staff, shall issue a Letter of Charges only upon completion of an investigation of a written complaint and review with legal counsel or prosecuting attorney.

(1) Subsequent to an investigation and validation of a complaint, a Letter of Charges will be sent on behalf of the Board to the person, applicant or licensee who is the subject of the complaint.

(A) The Letter of Charges shall be served in accordance with G.S. 1A-1, Rule 4,

Rules of Civil Procedure.

- (B) The Letter of Charges serves as the Board's formal notification to the person that an allegation of possible violation(s) of the Act and/or the rules of the Board has been initiated.
- (C) The Letter of Charges does not in and of itself constitute a contested case.
- (2) The Letter of Charges shall include the following:
 - (A) a short and plain statement of the factual allegations;
 - (B) a citation of the relevant sections of the statutes and/or rules involved;
 - (C) notification that a settlement conference will be scheduled upon request;
 - (D) explanation of the procedure used to govern the settlement conference;
 - (E) notification that if a settlement conference is not requested, or if held, does not result in resolution of the case, an administrative hearing will be scheduled; and
 - (F) if applicable, and in accordance with Board-adopted policy, an offer of voluntary surrender or reprimand also may be included in specified types of alleged violations of the Act.
- (3) A case becomes a contested case after the agency and the person, applicant or licensee do not agree to a resolution of the dispute through a settlement conference or either the agency or the person, applicant or licensee requests an administrative hearing.
- (h) No Board member shall discuss with any party the merits of any case pending before the Board. Any Board member who has direct knowledge about a case prior to the commencement of the proceeding shall disqualify himself from any participation with the majority of the Board hearing the case.
 - (i) A settlement conference, if requested by the person is held for the purpose of attempting to resolve a dispute through informal procedures prior to the commencement of formal administrative proceedings.
 - (1) The conference shall be held in the offices of the Board, unless another site is designated by mutual agreement of all involved parties.
 - (2) All parties shall attend or be represented at the settlement conference. The parties will be prepared to discuss the

alleged violations and the incidents on which these are based.

(3) At the conclusion of the day during which the settlement conference is held, a form must be signed by all parties which indicates whether the settlement offer is accepted or rejected. Subsequent to this decision:

(A) if a settlement is reached, the Board will forward a written settlement agreement containing all conditions of the settlement to the other party(ies); or

(B) if a settlement cannot be reached, the case will proceed to a formal administrative hearing.

(j) Informal disposition may be made of a contested case or an issue in a contested case by stipulation, agreement or consent order at any time prior to or during the hearing of a contested case.

(k) The Board shall give the parties in a contested case a Notice of Hearing not less than 15 calendar days before the hearing. The Notice shall be given in accordance with G.S. 150B-38(b) and (c). The Notice shall include:

(1) acknowledgement of service, or attempted service, of the Letter of Charges incompliance with Paragraph (g) of this Rule;

(2) date, time, and place of the hearing;

(3) a short and plain statement of the factual allegations;

(4) a citation of the relevant sections of the statutes and/or rules involved;

(5) notification of the right of a party to represent himself or to be represented by an attorney;

(6) a statement that, pursuant to Paragraph (n) of this Rule, subpoenas may be requested by the licensee to compel the attendance of witnesses or the production of documents;

(7) a statement advising the licensee that a notice of representation, containing the name of licensee's counsel, if any, should be filed with the Board not less than 10 calendar days prior to the scheduled date of the hearing;

(8) a statement advising the licensee that a list of witnesses for the licensee should be filed with the Board not less than 10 calendar days prior to the scheduled date of the hearing; and

(9) a statement advising the licensee that failure to appear at the hearing may result in the allegations of the Letter of

Charges being taken as true and that the Board may proceed on that assumption.

(l) Prehearing conferences may be held to simplify the issues to be determined, to obtain stipulations in regards to foundations for testimony or exhibits, to obtain stipulations of agreement on nondisputed facts or the application of particular laws, to consider the proposed witnesses for each party, to identify and exchange documentary evidence intended to be introduced at the hearing and to consider such other matters that may be necessary or advisable for the efficient and expeditious conduct of the hearing.

(1) The prehearing conference will be conducted in the offices of the Board, unless another site is designated by mutual agreement of all parties.

(2) The prehearing conference shall be an informal proceeding and shall be conducted by a Board-designated administrative law counsel.

(3) All agreements, stipulations, amendments, or other matters resulting from the prehearing conference shall be in writing, signed by all parties, and introduced into the record at the beginning of the formal administrative hearing.

(m) Prehearing conferences or administrative hearings conducted before a majority of Board members shall be held in the county where the Board maintains its principal office, or by mutual consent in another location which will better promote the ends of justice or better serve the convenience of witnesses or the Board. For those proceedings conducted by an Administrative Law Judge, the venue will be determined in accordance with G.S. 150B-38(e). All hearings conducted by the Board shall be open to the public.

(n) The Board, through its Executive Secretary, may issue subpoenas for the Board or a licensee, in preparation for, or in the conduct of, a contested case.

(1) Subpoenas for the attendance and testimony of witnesses or the production of documents or information, either at the hearing or for the purposes of discovery, shall be issued in accordance with G.S. 150B-39 and G.S. 1A-1, Rule 45.

(2) Requests by a licensee for subpoenas shall be made in writing to the Executive Secretary and shall include the following:

(A) the full name and home or business address of all persons to be subpoenaed.

naed; and

(B) the identification, with specificity, of any documents or information being sought.

(3) Subpoenas shall include the date, time, and place of the hearing and the name and address of the party requesting the subpoena. In the case of subpoenas for the purpose of discovery, the subpoena shall include the date, time, and place for responding to the subpoena.

(4) Subpoenas shall be served as in the manner provided by G.S. 150B-39 and G.S. 1A-1, Rule 45. The cost of service, fees, and expenses of any witnesses or documents subpoenaed shall be paid in accordance with G.S. 150B-39(c) and G.S. 7A-314.

(5) Objections to subpoenas shall be heard in accordance with G.S. 150B-39 and G.S. 1A-1, Rule 45.

(o) All motions related to a contested case, except motions for continuance and those made during the hearing, shall be in writing and submitted to the Board at least 10 calendar days before the hearing, if any, is to be held either on the motion or the merits of the case. Prehearing motions will be heard at a prehearing conference or at the contested case hearing prior to the commencement of testimony. The designated administrative law counsel will hear the motions and the response from the non-moving party pursuant to Rule 6 of the General Rules of Practice for the Superior and District Courts and rule on such motions. If the prehearing motions are heard by an Administrative Law Judge from Office of Administrative Hearings, the provisions of G.S. 150B-40(e) shall govern the proceedings.

(p) Motions for a continuance of a hearing may be granted upon a showing of good cause.

(1) Unless time does not permit, a request for a continuance of a hearing shall be made in writing and received by the office of the Board no less than seven calendar days before the hearing date. In determining whether good cause exists, consideration will be given to the ability of the party requesting a continuance to proceed effectively without a continuance. A motion for a continuance filed less than seven calendar days from the date of the hearing shall be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed

prior to the date of the hearing shall be ruled on by the Executive Secretary of the Board. All other motions for continuance will be ruled on by the majority of the Board members or Administrative Law Judge sitting at the hearing.

(A) "Good cause" includes: death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties if either more time is clearly necessary to complete mandatory preparation for the case, such as authorized discovery, and the parties and the administrative law judge have agreed to new hearing date or parties have agreed to a settlement of the case that has been or is likely to be approved by the final decision maker.

(B) "Good cause" shall not include: intentional delay; unavailability of counsel or other representative because of engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged, or if the notice of the other proceeding was received subsequent to the notice of the hearing for which the continuance is sought; unavailability of a witness if the witness testimony can be taken by deposition, and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

(2) During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the Board shall either order the additional testimony taken by deposition or continue the hearing to a future date for which oral notice on the record is sufficient. In such situations and to such extent as possible, the seated members of the Board and the designated administrative law counsel shall receive

the additional testimony. In the event that new members of the Board or a different administrative law counsel must participate, a copy of the transcript of the hearing will be provided to them prior to the receipt of the additional testimony.

(3) A continuance shall not be granted when to do so would prevent the case from being concluded within any statutory or regulatory deadline.

(q) All hearings by the Board will be conducted by a majority of members of the Board, except as provided in Subparagraph (1) of this Paragraph. The Board shall designate one of its members to preside at the hearing. The Board shall designate an administrative law counsel as procedural officer to conduct the proceedings of the hearing. The seated members of the Board shall hear all evidence, make findings of fact and conclusions of law, and issue an order reflecting a majority decision of the Board.

(1) When a majority of the members of the Board is unable or elects not to hear a contested case, the Board shall request the designation of an administrative law judge from the Office of Administrative Hearings to preside at the hearing. The provisions of Article 3A, Chapter 150B and 21 NCAC 17 .0016 shall govern a contested case in which an administrative law judge is designated as the Hearing Officer.

(2) In the event that any party or attorney at law or other representative of a party engages in behavior that obstructs the orderly conduct of proceedings or would constitute contempt if done in the General Court of Justice, the Board may apply to the applicable superior court for an order to show cause why the person(s) should not be held in contempt of the Board and its processes.

(r) All parties have the right to present evidence, rebuttal testimony, and argument with respect to the issues of law and policy, and to cross-examine witnesses. The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes shall apply to contested case proceedings, except as provided otherwise in this Rule and G.S. 150B-41.

(1) Sworn affidavits may be introduced by mutual agreement from all parties.

(2) All oral testimony shall be under oath or affirmation and shall be recorded. Unless otherwise stipulated by all par-

ties, witnesses are excluded from the hearing room until such time that they have completed their testimony and have been released.

(s) Upon compliance with the provisions of G.S. 150B-40(e), if applicable, and G.S. 150B-42, and review of the official record, as defined in G.S. 150B-42(b) and (c), the Board shall make a written final decision or order in a contested case.

(1) The final decision or order will be rendered by the Board meeting in quorum and by a majority of those present and voting.

(2) The decision or order shall be made based on:

(A) competent evidence and argument presented during the hearing and made a part of the official record in accordance with G.S. 150B-41 and Paragraph (r) of this Rule;

(B) stipulations of fact;

(C) matters officially noticed;

(D) other items in the official record that are not excluded by G.S. 150B-41 and Paragraph (r) of this Rule.

(3) All final decisions or orders shall be signed by the Executive Secretary and the Chair of the Board.

(4) A copy of the decision or order shall be served as in the manner provided by G.S. 150B-41(a). The cost of service fees, and expenses of any witnesses or documents subpoenaed shall be paid in accordance with G.S. 150B-39(c) and G.S. 7A-314.

(t) The official record of a contested case is available for public inspection upon reasonable request.

(1) The official record shall be prepared in accordance with G.S. 150B-42(b) and (c).

(2) Contested case hearings shall be recorded either by a magnetic type recording system or a professional court reporter using stenomask or stenotype.

(3) Transcripts of proceedings during which oral evidence is presented will be made only upon request of a party. Transcript costs shall include the cost of an original for the Board. Cost of the transcript or part thereof or copy of said transcript or part thereof which a party requests shall be divided equally among the party(ies) requesting a transcript. Cost shall be determined under supervision

of the Executive Secretary.

Statutory Authority: G.S. 90-356; 90-363.

TITLE 24 - INDEPENDENT AGENCIES

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Housing Finance Agency intends to amend rule(s) cited as 24 NCAC 1D .0101, .0301.

The proposed effective date of this action is November 1, 1992.

The public hearing will be conducted at 10:00 a.m. on August 18, 1992 at the North Carolina Housing Finance Agency, 3300 Drake Circle, Suite 200, Raleigh, NC 27607-3300.

Reason for Proposed Actions: To implement a new mortgage financing program for low and moderate first-time home buyers.

Comment Procedures: Written comments may be submitted to the APA Coordinator by September 2, 1992. Oral comments may be presented at the hearing.

CHAPTER 1 - N.C. HOUSING FINANCE AGENCY

SUBCHAPTER 1D - SINGLE FAMILY MORTGAGE PURCHASE PROGRAM

SECTION .0100 - GENERAL INFORMATION

.0101 OBJECTIVES

(a) One of the basic objectives of the agency is to finance the making of mortgage loans to persons and families of lower income to be used to enable such persons and families to purchase homes; agency has established a financing program to achieve this objective (herein referred to as the "single family mortgage purchase program").

(b) There are two three types of agency financing activity under the single family mortgage purchase program: first,

(1) under the forward commitment mortgage purchase segment of the program (hereinafter referred to as "forward commitment") the agency agrees with a

lender that if the lender will make mortgage loans to persons and families of lower income under certain terms and conditions specified in the North Carolina Housing Finance Agency mortgage purchase agreement, then the agency will buy such mortgage loans from the lender; second,

(2) under the existing mortgage purchase segment of the program (hereinafter referred to as "existing"), the agency agrees with a lender to purchase existing mortgage loans under the terms specified in the North Carolina Housing Finance Agency existing mortgage purchase agreement, pursuant to which the agency reviews a lender's portfolio of existing mortgage loans and selects certain mortgage loans which it purchases on the condition that lender (seller) expeditiously reinvest the proceeds of this sale in mortgage loans to persons and families of lower and moderate income; and

(3) under the mortgage backed securities segment of the program the agency agrees with a lender to purchase or participate in the purchase of federally-insured securities under terms specified in the North Carolina Housing Finance Agency mortgage loan origination, sale and servicing agreement, the proceeds of which are used to make new mortgage loans to income-eligible families.

Statutory Authority G.S. 122A-5.

SECTION .0300 - CONTRACTS AND FORMS

.0301 ELIGIBLE LENDER CONTRACT FORMS

(a) Qualified lenders shall establish their contractual relationships with the agency by entering into the "North Carolina Housing Finance Agency Forward Commitment Mortgage Purchase Agreement", and the "North Carolina Housing Finance Agency Existing Mortgage Purchase Agreement" and the "North Carolina Housing Finance Agency Mortgage Loan Origination, Sale and Servicing Agreement" form contracts.

(b) Under the "Forward Commitment Mortgage Purchase Agreement" form contract, the agency agrees to purchase from the lender and the lender agrees to sell a given amount of mortgage loans

which are a first lien on lands and improvements constituting mortgagor occupied, single family, residential units, which loans shall be made by lender to persons or families of lower income in accordance with the act. Lender's interest in the mortgage loan and the Deed of Trust shall be assigned to the agency at purchase. Lender must comply with all applicable state, local and federal laws and regulations. Appraisal is required. The loan term shall not exceed 30 years. Monthly payment of principal and interest and level payment amortization is required. The mortgagor must qualify as a person or family of lower income as defined by the act and in the rules and regulations of the agency. Mortgage insurance or guaranty is required as a condition of purchase of the mortgage loan. The agency shall not be obligated to purchase any mortgage loans under any such agreement unless the agency has approved the making of such mortgage loans in accordance with the act. Lender shall service the mortgage loans purchased pursuant to this agreement in accordance with the servicing agreement. Misrepresentation or breach of warranty by the lender as to a mortgage loan shall entitle agency to require lender to repurchase such mortgage loan. All obligations under this contract are subject to the successful sale and delivery by agency of its bonds and receipt of the bond proceeds.

(c) Under the "Existing Mortgage Purchase Agreement" form contract, the agency agrees to purchase from the lender and the lender agrees to sell, a given amount of interest bearing obligations owned by the lender on single-family residential units which are mortgagor occupied. These mortgage loans must be insured or guaranteed, and either made to persons or families of lower income as defined in the act and the rules and regulations of the agency or made to persons and families not of lower income provided the agency makes the determination required by the act that mortgage loans made to persons and families of lower income for residential housing are not available for purchase by the agency upon reasonable terms and conditions. The mortgage loans shall provide for payment of principal and interest at monthly intervals and for level payment amortization. All interest in the mortgage loan and the note and Deed of Trust shall be assigned to the agency at purchase. Mortgage insurance or guaranty by the FHA, VA or a qualified insurer is required as a condition of purchase of the mortgage loan. The lender agrees that within 180 days of receiving the sale proceeds for the mortgage loans sold under this agreement that the lender will commit to and

will promptly reinvest the sale proceeds in new mortgage loans to lower income persons and families. The lender shall submit evidence to the agency of the making of such new mortgage loans. All obligations made under this contract are subject to the successful sale and delivery by the agency of its bonds and receipt by the agency of the bond proceeds. The subject mortgage loan must be a valid first lien on the property. Unpaid principal balance and interest on the mortgage loan must be accurately stated by lender. Representations by lender as to counterclaims available against the mortgage loan and modification, satisfaction, cancellation and subordination must be true. Lender must have complied with all applicable federal, state and local laws and rules and regulations. Misrepresentation or breach of warranty by lender as to a mortgage loan shall entitle agency to require lender to repurchase such mortgage loan.

(d) Under the "Mortgage Loan Origination, Sale and Servicing Agreement," the agency agrees to issue single family revenue bonds be used as follows:

- (1) a portion of the proceeds will be made available to the Trustee to purchase certain fully-modified mortgage pass-through certificates guaranteed by the Government National Mortgage Association (GNMA). The certificates will be backed by mortgage loans originated and funded by the Lender and purchased by the Servicer;
- (2) a portion of the proceeds will be made available to the Trustee to purchase single pool, guaranteed pass-through Federal National Mortgage Association (FNMA) Mortgage Backed Securities, guaranteed as to timely payment of principal and interest by FNMA and backed by the Lender and purchased by the Servicer.

Statutory Authority G.S. 122A-5.

The Rules Review Commission (RRC) objected to the following rules in accordance with G.S. 143B-30.2(c). State agencies are required to respond to RRC as provided in G.S. 143B-30.2(d).

AGRICULTURE**Structural Pest Control Division**

2 NCAC 34 .0406 - Spill Control	<i>RRC Objection</i>	07/16/92
2 NCAC 34 .0603 - Waivers	<i>RRC Objection</i>	07/16/92
2 NCAC 34 .0902 - Financial Responsibility	<i>RRC Objection</i>	07/16/92

ECONOMIC AND COMMUNITY DEVELOPMENT**ABC Commission**

4 NCAC 2R .0702 - Disciplinary Action of Employee Rule Returned to Agency	<i>RRC Objection</i>	05/21/92
4 NCAC 2R .1205 - Closing of Store Agency Repealed Rule	<i>RRC Objection</i>	05/21/92
4 NCAC 2S .0503 - Pre-Orders Rule Returned to Agency	<i>Obj. Removed</i>	06/18/92
	<i>RRC Objection</i>	05/21/92

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES**Coastal Management**

15A NCAC 7H .0306 - General Use Standards for Ocean Hazard Areas Rule Returned to Agency	<i>RRC Objection</i>	05/21/92
		06/18/92

Departmental Rules

15A NCAC 1J .0204 - Loans from Emergency Revolving Loan Accounts	<i>RRC Objection</i>	06/18/92
15A NCAC 1J .0302 - General Provisions	<i>RRC Objection</i>	06/18/92
15A NCAC 1J .0701 - Public Necessity: Health: Safety and Welfare	<i>RRC Objection</i>	06/18/92

Environmental Health

15A NCAC 18A .3101 - Definitions Agency Revised Rule	<i>RRC Objection</i>	06/18/92
	<i>Obj. Removed</i>	06/18/92

Environmental Management

15A NCAC 2O .0302 - Self Insurance	<i>RRC Objection</i>	06/18/92
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Health: Epidemiology

15A NCAC 19II .0601 - Birth Certificates Agency Revised Rule	<i>RRC Objection</i>	06/18/92
	<i>Obj. Removed</i>	06/18/92

Soil and Water Conservation

RRC OBJECTIONS

*15A NCAC 6E .0007 - Cost Share Agreement
Agency Revised Rule*

*RRC Objection 06/18/92
Obj. Removed 06/18/92*

Wildlife Resources and Water Safety

15A NCAC 10E .0004 - Use of Areas Regulated

RRC Objection 06/18/92

HUMAN RESOURCES

Aging

*10 NCAC 22R .0301 - Definitions
Agency Revised Rule*

*RRC Objection 07/16/92
RRC Objection 07/16/92*

Day Care Rules

*10 NCAC 46D .0305 - Administration of Program
Agency Revised Rule
10 NCAC 46D .0306 - Records
Agency Revised Rule*

*RRC Objection 06/18/92
Obj. Removed 06/18/92
RRC Objection 06/18/92
Obj. Removed 06/18/92*

Mental Health: General

*10 NCAC 14M .0704 - Program Director
Agency Revised Rule*

*RRC Objection 05/21/92
Obj. Removed 06/18/92*

INSURANCE

Departmental Rules

*11 NCAC 1 .0106 - Organization of the Department
Agency Revised Rule*

*RRC Objection 06/18/92
Obj. Removed 06/18/92*

Multiple Employer Welfare Arrangements

11 NCAC 18 .0019 - Description of Forms

RRC Objection 06/18/92

Seniors' Health Insurance Information Program

11 NCAC 17 .0005 - SHIIP Inquiries to Insurers and Agents

RRC Objection 06/18/92

LICENSING BOARDS AND COMMISSIONS

Dietetics/Nutrition

*21 NCAC 17 .0014 - Code of Ethics for Professional Practice Conduct
Agency Revised Rule
Agency Revised Rule*

*RRC Objection 05/21/92
RRC Objection 05/21/92
Obj. Removed 06/18/92*

STATE PERSONNEL

Office of State Personnel

*25 NCAC 1E .1301 - Purpose
25 NCAC 1E .1302 - Policy*

*RRC Objection 07/16/92
RRC Objection 07/16/92*

RRC OBJECTIONS

25 NCAC 1E .1303 - <i>Administration</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1E .1304 - <i>Qualifying to Participate in Voluntary Shared Leave Prgm</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1E .1305 - <i>Donor Guidelines</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1E .1306 - <i>Leave Accounting Procedures</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1H .0603 - <i>Special Recruiting Programs</i>	<i>RRC Objection</i>	05/21/92
<i>Agency Repealed Rule</i>	<i>Obj. Removed</i>	06/18/92
25 NCAC 1I .1702 - <i>Employment of Relatives</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1I .1903 - <i>Applicant Information and Application</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1I .2401 - <i>System Portion I: Recruitment, Selection, & Advancement</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1I .2402 - <i>System Portion II: Classification/Compensation</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1I .2403 - <i>System Portion III: Training</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1I .2404 - <i>System Portion IV: Employee Relations</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1I .2405 - <i>System Portion V: Equal Emp Oppty/Affirmative Action</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1I .2406 - <i>System Portion VI: Political Activity</i>	<i>RRC Objection</i>	07/16/92
25 NCAC 1J .1005 - <i>Eligibility for Services</i>	<i>RRC Objection</i>	05/21/92
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/18/92

This Section of the Register lists the recent decisions issued by the North Carolina Supreme Court, Court of Appeals, Superior Court (when available), and the Office of Administrative Hearings which invalidate a rule in the North Carolina Administrative Code.

1 NCAC 5A .0010 - ADMINISTRATIVE PROCEDURES

Thomas R. West, Administrative Law Judge with the Office of Administrative Hearings, declared two portions of Rule 1 NCAC 5A .0010 void as applied in *Stauffer Information Systems, Petitioner v. The North Carolina Department of Community Colleges and The North Carolina Department of Administration, Respondent and The University of Southern California, Intervenor-Respondent* (92 DOA 0666).

15A NCAC 19A .0202(d)(10) - CONTROL MEASURES - HIV

Brenda B. Becton, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 19A .0202(d)(10) void as applied in *ACT-UP TRIANGLE (AIDS Coalition to Unleash Power Triangle), Steven Harris, and John Doe, Petitioners v. Commission for Health Services of the State of North Carolina, Ron Levine, as Assistant Secretary of Health and State Health Director for the Department of Environment, Health, and Natural Resources of the State of North Carolina, William Cobey, as Secretary of the Department of Environment, Health, and Natural Resources of the State of North Carolina, Dr. Rebecca Meriwether, as Chief, Communicable Disease Control Section of the North Carolina Department of Environment, Health, and Natural Resources, Wayne Bobbitt Jr., as Chief of the HIV STD Control Branch of the North Carolina Department of Environment, Health, and Natural Resources, Respondents* (91 EHR 0818).

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698.

KEY TO CASE CODES

ABC	Alcoholic Beverage Control Commission	DST	Department of State Treasurer
BDA	Board of Dental Examiners	EDC	Department of Public Instruction
BME	Board of Medical Examiners	EHR	Department of Environment, Health, and Natural Resources
BMS	Board of Mortuary Science	ESC	Employment Security Commission
BOG	Board of Geologists	HAF	Hearing Aid Dealers and Fitters Board
BON	Board of Nursing	HRC	Human Relations Committee
BOO	Board of Opticians	IND	Independent Agencies
CFA	Commission for Auctioneers	INS	Department of Insurance
COM	Department of Economic and Community Development	LBC	Licensing Board for Contractors
CPS	Department of Crime Control and Public Safety	MLK	Milk Commission
CSE	Child Support Enforcement	NHA	Board of Nursing Home Administrators
DAG	Department of Agriculture	OAH	Office of Administrative Hearings
DCC	Department of Community Colleges	OSP	Office of State Personnel
DCR	Department of Cultural Resources	PHC	Board of Plumbing and Heating Contractors
DCS	Distribution Child Support	POD	Board of Podiatry Examiners
DHR	Department of Human Resources	SOS	Department of Secretary of State
DOA	Department of Administration	SPA	Board of Examiners of Speech and Language Pathologists and Audiologists
DOJ	Department of Justice	WRC	Wildlife Resources Commission
DOL	Department of Labor		
DSA	Department of State Auditor		

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Anne R. Gwaltney, Milton H. Askew, Jr. and Anna L. Askew v. EHR and Pamlico County Health Department	89 DHR 0699	Reilly	07/17/92
Century Care of Laurinburg, Inc. v. DHR, Division of Facility Services, Licensure Section	91 DHR 0257	West	06/30/92
Wade Charles Brown, Jr. v. N.C. Crime Victims Compensation Commission	91 CPS 0345	Chess	07/08/92
Lisa M. Reichstein v. Office of Student Financial Aid, East Carolina University	91 OSP 0662	Nesnow	06/24/92

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Alcoholic Beverage Control Commission v. Daniels Investments, Inc., t/a Leather & Lace - East 4205 Monroe Road, Charlotte, N.C. 28205	91 ABC 0799	Mann	07/14/92
ACT-UP Triangle (AIDS Coalition to Unleash Power Triangle, Steven Harris, and John Doe v. Commission for Health Services of the State of N.C., Ron Levine, as Assistant Secretary of Health and State Health Director for EHR of the State of N.C., William Cobey, as Secretary of EHR of the State of N.C., Dr. Rebecca Meriwether, as Chief, Communicable Disease Control Section of the N.C. EHR, Wayne Bobbitt, Jr., as Chief of the HIV/STD Control Branch of the N.C.EHR	91 EHR 0818	Becton	07/08/92
Jane C. O'Malley, Melvin L. Cartwright v. EHR and District Health Department Pasquotank-Perquimans-Camden-Chowan	91 EHR 0838	Becton	07/02/92
Grotgen Nursing Home, Inc., Britthaven, Inc. v. Certificate of Need Section, Division of Facility Svcs, DHR	91 DHR 0964 91 DHR 0966	Nesnow	07/06/92
Ramona S. Smith, R.N. v. N.C. Teachers'/St Emps' Comp Major Medical Plan	91 DST 0984	Chess	06/18/92
Walter McGlone v. DHR, Division of Social Services, CSE	91 CSE 1030	Morrison	07/13/92
William Watson v. DHR, Division of Social Services, CSE	91 CSE 1047	Becton	07/08/92
Catawba Memorial Hospital v. DHR, Division of Facility Svcs. Certificate of Need Section and Frye Regional Medical Ctr, Inc. and Amireit (Frye), Inc. and Thoms Rehabilitation Hospital Health Services Corp. and Frye Regional Medical Ctr, Inc. and Amireit (Frye), Inc. v. DHR, Division of Facility Svcs. Certificate of Need Section and Thoms Rehabilitation Hospital Health Services Corp. and Catawba Memorial Hospital	91 DHR 1061 91 DHR 1087	Reilly	07/13/92

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Wade A. Burgess v. DHR, Division of Social Services, CSE	91 CSE 1114	Gray	07/01/92
Harry L. King v. Department of Transportation	91 OSP 1162	Morgan	07/13/92
Isaac H. Galloway v. DHR, Division of Social Services, CSE	91 CSE 1190	Reilly	06/30/92
Russell A. Barclift v. DHR, Division of Social Services, CSE	91 CSE 1207 92 CSE 0275	Reilly	06/30/92
Herman Edward Main II v. DHR, Division of Social Services, CSE	91 CSE 1225	Nesnow	07/07/92
Albert Louis Stoner III v. DHR, Division of Social Services, CSE	91 CSE 1244	Gray	07/01/92
James E. Greene v. DHR, Division of Social Services, CSE	91 CSE 1245	Nesnow	07/14/92
Donald R. Allison v. DHR, Caswell Center	91 OSP 1427	Reilly	06/30/92
Peggy N. Barber v. The University of North Carolina at Chapel Hill	92 OSP 0120	Reilly	07/13/92
Alcoholic Beverage Control Commission v. John Wade Lewis, t/a Tasty Grill	92 ABC 0145	Nesnow	07/15/92
Clifton R. Johnson v. O'Berry Center, Department of Human Resources	92 OSP 0381	West	07/08/92
Northview Mobile Home Park v. Department of Environment, Health, and Natural Resources	92 EHR 0507	Reilly	07/13/92
Alice Hunt Davis v. Department of Human Resources	92 OSP 0526	West	07/16/92

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
John W. Surles v. Crime Victims Compensation Commission	92 CPS 0595	Reilly	07/13/92
Stauffer Information Systems v. Department of Community Colleges and the N.C. Department of Administration and The University of Southern California	92 DOA 0666	West	07/08/92
L. Stan Bailey v. Chancellor Moran and UNC-Greensboro	92 OSP 0679	West	07/10/92

**STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG**

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
91 ABC 0799**

N.C. ALCOHOLIC BEVERAGE)
CONTROL COMMISSION,)
Petitioner)
v.)
DANIELS INVESTMENTS, INC.,)
T/A LEATHER & LACE - EAST)
4205 MONROE ROAD)
CHARLOTTE, NC 28205,)
Respondent)

RECOMMENDED DECISION

This contested case was heard on the 11th day of May, 1992, at the Office of Administrative Hearings, Raleigh, Wake County, North Carolina, before Julian Mann, III, Chief Administrative Law Judge. The record closed with the filing of proposed Findings of Fact and Conclusions of Law on June 1, 1992.

APPEARANCES

For Petitioner: Glenn B. Lassiter, Jr.
Agency Legal Specialist
N. C. Alcoholic Beverage Control Commission
P.O. Box 26687
Raleigh, North Carolina 27611-6687
ATTORNEY FOR PETITIONER

For Respondent: Joseph L. Ledford
Rawls, Dickinson & Ledford
Attorneys At Law
923 Law Building
730 E. Trade Street
Charlotte, North Carolina 28202
ATTORNEY FOR RESPONDENT

WITNESSES

For Petitioner: Robert D. Sellers

For Respondent: David James Craven
Walter David Baucom, Jr.

EXHIBITS

For Petitioner: None

For Respondent: Respondent's Exhibit #1a, 1b, 1c, 1d, 1e and 1f,
Respondent's Exhibit #2 and #3.

ISSUES*

Whether the Respondent or its employee violated the ABC laws by:

1. Employee engaging in disorderly conduct on the licensed premises on or about July 17, 1991, at 12:18 a.m., in violation of ABC Commission Rule 4 NCAC 2S.0210.

2. Knowingly allowing employee to engage in unlawful acts on the licensed premises; to wit, two counts of Homicide, one count of Assault With a Deadly Weapon With Intent to Kill, one count of Possession of a Firearm by a Felon, on or about July 17, 1991, at 12:18 a.m., in violation of G.S. 18B-1005(a)(3).

3. Employing an unsuitable person who has been convicted of a felony within three years, on the licensed premises, on or about July 17, 1991, at 12:18 a.m., in violation of G.S. 18B-1003(c).

4. (b) What penalty, if any, should be imposed under G.S. 18B-104?

STIPULATIONS

On April 14, 1992, the attorneys for the Petitioner and Respondent filed Stipulations in the Office of Administrative Hearings in the above-captioned contested case and these Stipulations are set out in full below:

"Now comes the Petitioner and the Respondent and enter into the following Stipulations:

1. The Respondent holds beer, unfortified wine, fortified wine and mixed beverage private club permits issued by the North Carolina ABC Commission.

2. On or about Tuesday, July 16, 1991, Clarence William Richardson was employed as the manager of Respondent's club.

3. Richardson was convicted on August 16, 1989, of felony possession of cocaine under Article 5, Chapter 90 of the General Statutes.

4. At about midnight on July 16, 1991, while Richardson was on duty as manager, three (3) persons entered the foyer area of Respondent's club. These persons were later identified as Barry Alan Kirkpatrick, Brian Michael Kirkpatrick, and James E. Kirkpatrick.

5. Respondent's bartender, Richard Albert Pincelli, was working as the doorman at this time. Pincelli was behind a plexiglass window inside the club.

6. Pincelli observed the three persons and, based upon his observation, refused to allow them to enter because he believed them to be intoxicated.

7. When Pincelli refused to allow them to enter, one of the three hit the plexiglass window, knocking it out of the frame and into Pincelli. One of the three then tried to strike Pincelli.

8. Pincelli then yelled for "Billy Jack", which is Richardson's nickname, to help him. Pincelli also called 911 for police assistance.

9. Richardson, who was playing a video game, approached the door between the club area and the foyer. He and another person tried to open the door but were unable to because one or more of the three men

*See Petitioner's Prehearing Statement, filed September 24, 1991. Respondent's Prehearing Statement, filed October 2, 1991

10. Richardson then went to the office and removed a .45 calibre semi-automatic hand gun from the desk drawer.

11. Richardson then returned with the gun to the foyer area. The three Kirkpatricks were then located outside the glass door in the parking area of the club. There was no-one in the foyer area except Richardson.

12. Richardson pushed open the door and asked the Kirkpatricks to "get out of here". He was joined by Danny Thompson in the foyer.

13. An altercation ensued which resulted in Richardson firing several shots and striking all three Kirkpatricks.

14. Barry Alan Kirkpatrick and Brian Michael Kirkpatrick were pronounced dead at the scene.

15. James E. Kirkpatrick was also shot but his injuries proved not to be fatal.

16. Richardson then re-entered the club, placed the gun behind the bar and waited for the police to arrive.

17. Police arrived shortly thereafter and initiated an investigation.

18. Based upon that investigation, Richardson was convicted in Superior Court of Mecklenburg County on February 28, 1992, of two counts of Second Degree Murder and one count of Assault With a Deadly Weapon With the Intent to Kill.

19. The Respondent acknowledges that Clarence Richardson was hired as a manager of the club and the Respondent was aware of Mr. Richardson's previous felony conviction.

20. When Mr. Richardson contacted Walter David Baucom about employment, he was an inmate at the Mecklenburg County Satellite Jail.

21. When Mr. Richardson asked the Respondent if he could be employed, he spoke with Mr. Baucom, and Mr. Baucom advised him that he could not be hired as a result of his status as a convicted felon.

22. However based upon assurances from the Mecklenburg County Sheriffs Department that it would be permissible for Richardson to be employed at Leather 'N Lace on a work release program, under the control and supervision of the Mecklenburg County Sheriff's Department. Mr. Baucom agreed to hire Richardson. Thereafter the Mecklenburg County Sheriff's Department approved Richardson's application for placement as a work release inmate.

23. That Mr. Baucom, in reliance upon the representation made to him by the Mecklenburg County Sheriff's Department, engaged Mr. Richardson as an employee, assuming that he would be working under the supervision and control of the Mecklenburg County Sheriff's Department."

Based upon the Stipulations, and the greater weight of the evidence, the undersigned makes the following:

FINDINGS OF FACT

1. The Office of Administrative Hearings has jurisdiction over the above-captioned contested case

pursuant to Chapters 18B and 150B of the North Carolina General Statutes.

2. Petitioner issued to Respondent and Respondent holds beer, unfortified wine, fortified wine, and mixed beverage ABC private club permits.

3. Walter David Baucom, Jr., is a citizen and resident of Charlotte, Mecklenburg County, North Carolina, and the permittee and principal owner of Daniels Investment, Inc., t/a (trading as) Leather 'N Lace - East, located at 4209 Monroe Road, Charlotte, Mecklenburg County, North Carolina.

4. Other ABC permits have been issued to other establishments in Gastonia, Hickory and Charlotte area trading under the name of Leather 'N Lace. Although these establishments are financially connected and owned, only ABC permits issued to Daniels Investments, Inc., t/a Leather 'N Lace - East (Monroe Road) is the subject of this contested case.

5. During the year 1990, Petitioner issued three warnings and one citation to Respondent. During the year 1991, no warnings or citations were issued to the Respondent.

6. That on or about July 16, 1991, Clarence William Richardson was employed as the manager of the Respondent.

7. When Richardson contacted Walter David Baucom about employment, he was an inmate at the Mecklenburg County satellite jail.

8. When Mr. Richardson asked Respondent if he could be employed, he spoke with Mr. Baucom, and Mr. Baucom advised him that he could not be hired as a result of his status as a convicted felon.

9. However, based upon assurances from the Mecklenburg County Sheriff's Department that it would be permissible for Richardson to be employed at Leather 'N Lace on a work release program, under the control and supervision of the Mecklenburg County Sheriff's Department, Mr. Baucom agreed to hire Richardson. Thereafter, the Mecklenburg County Sheriff's Department approved Richardson's application for the placement as a work release inmate.

10. At the time that Mr. Richardson was employed as manager, Respondent, by and through Walter David Baucom, Jr., was aware that Richardson had been convicted of felony possession of cocaine under Article 5, Chapter 90 of the General Statutes. The date of conviction was August 16, 1989.

11. At about midnight on July 16, 1991, while Richardson was on duty as manager, three persons entered the foyer area of Respondent's club. These persons were later identified as Barry Alan Kirkpatrick, Brian Michael Kirkpatrick and James E. Kirkpatrick.

12. Respondent's bartender, Richard Albert Pincelli, was working as the doorman at this time. Pincelli was behind a plexiglass window inside the club.

13. Pincelli observed the three persons and, based upon his observation, refused to allow them to enter because he believed them to be intoxicated.

14. When Pincelli refused to allow them to enter, one of the three hit the plexiglass window, knocking it out of the frame and into Pincelli. One of the three then tried to strike Pincelli.

15. Pincelli then yelled for "Billy Jack", which is Richardson's nickname, to help him. Pincelli also called 911 for police assistance.

16. Richardson, who was playing a video game, approached the door between the club area and the foyer. He and another person tried to open the door but were unable to because one or more of the three men in the foyer area were holding it.

17. Richardson then went to the office and removed a .45 calibre semi-automatic handgun from the desk drawer.

18. Richardson then returned with the gun to the foyer area. The three Kirkpatricks were then located outside the glass door in the parking area of the club. There was no one in the foyer area except Richardson.

19. Richardson pushed open the front door and asked the Kirkpatricks to get out of here. He was joined by Danny Thompson in the foyer.

20. An altercation ensued which resulted in Richardson firing several shots and striking all three Kirkpatricks.

21. Barry Alan Kirkpatrick and Brian Michael Kirkpatrick were pronounced dead at the scene.

22. James E. Kirkpatrick was also shot, but his injuries proved not to be fatal.

23. Richardson then reentered the club, placed the gun behind the bar and waited for the police to arrive.

24. The police arrived shortly thereafter and initiated an investigation. Richardson was convicted in Superior Court of Mecklenburg County on February 28, 1992, of two counts of Second Degree Murder and one count of Assault With a Deadly Weapon With the Intent to Kill.

25. Based upon the testimony of Agent Sellers, the testimony of Mr. David Baucom, Jr. and the record of ABC violations for all of the establishments which trade as Leather 'N Lace, the undersigned finds that Respondent's establishments, including Leather 'N Lace - East, prior to the incident in question, generally held a favorable reputation among the law enforcement community in Mecklenburg County.

26. At Respondent's establishment there are six permanent salaried employees and 12 self employed contractors.

27. Respondent prohibits the possession or use of firearms by its employees.

Based upon the foregoing Stipulations and Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. That the Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 18B and 150B of the North Carolina General Statutes.

2. G.S. 18B-003(c)(1) prohibits a permittee (ABC) to knowingly employ a person convicted of a felony within three years of the date of the employment. By Stipulation, the parties have agreed that Respondent's employee, Clarence Richardson, had been convicted of felony possession of cocaine within three years of the date of his employment.

3. Richardson was employed as "manager" of the Respondent's establishment. Notwithstanding the assurances of the Mecklenburg County Sheriff's Department to the contrary, the statutory prohibition is quite clear, and the undersigned concludes that this provision was violated by the Respondent. As found in the Stipulations and Findings of Fact, this employment was urged upon Respondent by the Mecklenburg County Sheriff's Department. The assurances of the Mecklenburg County Sheriff's Department, through its agents, did not legalize an otherwise unlawful statutory prohibition nor did the assurances constitute an estoppel as to the Petitioner. An estoppel, if any, would only run to the persons making a representation. Therefore, the Petitioner is in no way estopped from asserting these violations. However, the violation found under the

facts as stipulated indicates a lack, to some degree, of intent. The lack of intent is not a defense in a contested case to an alleged violation, nor was such a defense plead or argued, but it can be a mitigating factor in determining the penalty.

4. The provisions of G.S. 18B-1005(a)(2) prohibit any fighting or other disorderly conduct on Respondent's premises. G.S. 18B-1005(3) also prohibits a permittee from engaging in "any other unlawful acts."

5. Without question, Respondent's employee engaged in disorderly conduct and fighting by discharging the .45 caliber semi-automatic handgun at those who were ejected from the Respondent's premises. Richardson was convicted in Superior Court of Mecklenburg County on February 28, 1992, of two counts of Second Degree Murder and one count of Assault With a Deadly Weapon With the Intent to Kill.

6. Not only do these actions constitute "disorderly conduct" and "fighting" within the contemplation of G.S. 18B-1005(2) and 4 NCAC 25 .0210, they also constitute a violation of "any other unlawful acts." Convictions of two separate counts of Second Degree Murder and one count of Assault With a Deadly Weapon With the Intent to Kill constitute engaging in "unlawful activity."

7. Mr Richardson, as manager, is acting as an employee of the Respondent. A manager is a type of employee that is vested with a wide range of authority to act on behalf of the Respondent.* Respondent must assume responsibility under the ABC laws for the conduct of its manager especially in exercising a managerial function of ejecting disorderly patrons from the Respondent's premises.

8. The testimony of Mr. Baucom supported by his affidavit (Respondent's Exhibit #3) indicates that Mr. Richardson lacked authority to possess a firearm and certainly lacked the authority to act in the manner in which he did. However, clearly, Mr. Richardson was acting in pursuit of a legitimate goal of Respondent in attempting to eject the patrons. The unreasonable force utilized by Respondent's employee in discharging a firearm which resulted in the death of two of the three persons was most unfortunate. Respondent must assume the consequences of the acts of its employee by placing him in positions of a "manager" and giving him the authority to control Respondent's premises. These acts of Respondent's employee will be imputed to the Respondent, as employer, under these circumstances.

9. Mr. Baucom verbally testified that the Respondent's club prohibits firearms.** However, the firearm that was retrieved by Richardson came from his desk drawer. Lack of actual knowledge on the part of the Respondent as to the existence of this weapon on Respondent's premises and even if contrary to its express instructions does not relieve Respondent of its imputed knowledge of the existence of the weapon on the premises nor the consequences resulting from its use. Dove v. North Carolina Board of Alcoholic Control, 37 N.C. App. 605, 608, 246 S.E. 2d, 584 (1978), provides ample authority for imputing knowledge of an employee's acts to a permittee who may lack actual knowledge. "In a number of cases the courts have upheld revocation, cancellation or suspension of liquor licenses because of improper, or wrongful or unlawful acts of the licensees' employees or agents. although such acts are committed against the instructions of the licensee or without his knowledge or consent. This is sound law, which we adopt (citations omitted)...In our opinion there is not room for debate on the question whether for the purpose of suspension or cancellation of licenses, the holder of a retail liquor license should be held responsible for the acts and conduct of his employees and the operation of the business. Sound public policy requires that he is responsible. To hold otherwise would lead to a complete breakdown of the whole system and theory of supervision contemplated by the Act, and would permit a licensee to escape liability for suspension or revocation of his license merely on the ground

*The American Heritage Dictionary, Second College Edition, defines "manage": 1. To direct or control the use of. 2. To exert control over. 3. To make submissive to one's authority, discipline or persuasion."

**No mention is made in Respondent's Exhibit #2 as to the prohibition of handguns as to the entertainers. However, the booklet indicates that management may randomly search the lockers assigned to entertainers for illegal drugs.

he had no knowledge of and had not authorized or approved a violation by the employee. In an effort to get to this very thing the Legislature has seen fit to classify those persons to whom licenses may be granted and who may be employed by licensees. In the nature of things it must be held that the licensee is responsible at all times for the acts and conduct of his employee in the operation of the business." (emphasis added)

10. Nothing found or concluded herein indicates direct culpability by Respondent's owners for the actions of its employee except that the ABC statutes and regulations, as construed, requires them to be vicariously accountable.

Based upon the foregoing Stipulations, Findings of Fact and Conclusions of Law, the Chief Administrative Law Judge makes the following:

RECOMMENDED DECISION

The Chief Administrative Law Judge recommends to the Petitioner, ABC Commission, that all of Respondent's ABC permits be suspended for a period of three years but that the last six months of the three year suspension be stayed upon the condition that the Respondent not violate any of the ABC laws or rules based upon the mitigating factor as found in the Conclusions of Law #3.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statutes 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Alcoholic Beverage Control Commission.

This the 15th day of July, 1992.

Julian Mann, III
Chief Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
91 DHR 0964, 0966**

GROTTGEN NURSING HOME, INC.,)
BRITTHAVEN, INC.,)
Petitioners,)
v.)
CERTIFICATE OF NEED SECTION,)
DIVISION OF FACILITY SERVICES,)
NORTH CAROLINA DEPARTMENT OF)
HUMAN RESOURCES,)
Respondent.)

RECOMMENDED DECISION

The above-captioned, consolidated matter was heard before Delores O. Nesnow, duly appointed Administrative Law Judge, on July 1, 1992, in Raleigh, North Carolina.

APPEARANCES

For Petitioner Grotgen Nursing Home, Inc.: Mary Beth Johnston, Poyner and Spruill
Post Office Box 10096
Raleigh, North Carolina 27605

For Petitioner Britthaven, Inc.: Todd Hemphill, Bode, Call and Green
Post Office Box 6338
Raleigh, North Carolina 27628

For Respondent: Meg Scott Phipps, Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

STATUTES AND RULES IN ISSUE

N.C. Gen. Stat. § 131E, Article 9
N.C. Admin. Code, Title 10, Subchapter 3R

ISSUES

Did Respondent exceed its authority or jurisdiction, act arbitrarily and capriciously, act erroneously, fail to use proper procedure, or fail to act as required by law or rule in determining that the certificate of need as to Grotgen Nursing Home, Inc. should be withdrawn for its failure to make good faith efforts to meet the construction timetable for the expansion project?

Did Respondent exceed its authority or jurisdiction, act arbitrarily or capriciously, act erroneously, fail to use proper procedure, or fail to act as required by law or rule in determining that the certificate of need as to Britthaven, Inc. should be withdrawn for its failure to make good faith efforts to meet the construction timetable for the expansion project?

Based upon careful consideration of the testimony and evidence presented at the hearing, the documents and exhibits received into evidence, and the entire record in this proceeding, the undersigned makes the following:

FINDINGS OF FACT

1. The Petitioner, Grotgen Nursing Home, Inc. ("Grotgen") is a North Carolina corporation with its principal place of business in New Hanover County, North Carolina, and is the owner and lessor of a fifty bed nursing home in Wilmington, North Carolina.

2. The Petitioner, Britthaven, Inc. ("Britthaven"), is a North Carolina corporation which operates a chain of nursing homes in North Carolina and currently leases and operates the fifty bed nursing home owned by Grotgen under the name "Britthaven of Wilmington."

3. The Respondent, Certificate of Need Section, Division of Facility Services, North Carolina Department of Human Resources ("CON Section"), is an agency of the State of North Carolina authorized by N.C. Gen. Stat. § 131E-177 to grant, deny or withdraw certificates of need.

4. On or about March 16, 1990, Grotgen timely filed a joint application with Britthaven for Project I.D. No. 0-3953-90 with the CON Section for the expansion of its nursing home, including 20 skilled care, 40 intermediate care and 20 home for the aged beds (the "Project").

5. The application for Project I.D. No. 0-3953-90 was subsequently determined complete for review and included in the next scheduled review cycle beginning on April 1, 1990.

6. By letter dated on or about August 28, 1990, the CON Section notified Grotgen and Britthaven that their joint CON application for Project I.D. No. 0-3953-90 had been approved. Thus, Grotgen and Britthaven became joint holders of the certificate of need.

7. No petition for a contested case hearing was filed by any competing applicant and the certificate of need for Project I.D. No. 0-3953-90 was forwarded to Grotgen and Britthaven on October 2, 1990.

8. The certificate of need issued to Grotgen and Britthaven contained the following timetable:

Obtaining funds necessary to undertake Project	12/30/90
Completion of preliminary drawings	09/15/90
Completion of final drawings	10/01/90
Approval of final drawings	11/01/90
25% Completion of Construction	01/01/91
50% Completion of Construction	03/15/91
75% Completion of Construction	04/15/91
Completion of Construction	06/30/91
Occupancy/Offering of Services	07/30/91
Licensure of facility	07/30/91

9. By letter dated July 31, 1991, the CON Section notified Grotgen and Britthaven that it was considering the initiation of withdrawal proceedings because the Project was behind schedule and requested comprehensive reports to document the progress made toward development of the Project.

10. A comprehensive progress report was submitted by Britthaven on August 9, 1991 and by Grotgen on August 14, 1991.

11. Thereafter, on September 13, 1991, the CON Section notified Grotgen and Britthaven by letter that the certificate of need for the Project would be withdrawn effective October 13, 1991 for each holders' alleged failure to make a good faith effort to meet this timetable.

12. On October 11, 1991, Grotgen file a petition for a contested case hearing to protect its rights under the certificate of need and to prevent withdrawal. Also, on October 11, 1991, Britthaven filed a separate petition for a contested case hearing to protect its rights under the certificate of need and to prevent withdrawal.

These contested cases were consolidated for hearing by Order dated February 21, 1992.

13. Efforts made by Grotgen to meet the Project timetable and to develop the Project include the following:

A. Immediately following the filing of the certificate of need application, Grotgen signed an agreement with Green Engineering for Green to represent Grotgen and Britthaven in a rezoning of the back portion of the property from R-15 to Office & Institutional ("O&I") required in order to develop the Project. Rezoning was requested and thereafter accomplished in the summer of 1990, prior to an approval of the application, in order to be in a position to move ahead with the Project as expeditiously as possible upon approval.

B. Also, in the summer of 1990, Grotgen attempted to establish a banking relationship with several local banks, including First Hanover, Wachovia and First Union, in order to have financing available for the Project upon its approval.

C. In order to obtain financing, Grotgen was required by the lender to have the property appraised and an environmental impact study performed. In July of 1990, Grotgen obtained an appraisal from the firm of Joseph Robb & Associates, incurring a cost of approximately \$2,000.00. In Late August of 1990, Westinghouse prepared an environmental impact study of the property for Grotgen. In connection with this study, Grotgen expended a significant amount of time by having to be present for soil testing and incurred expenses of approximately \$1,800.00. These efforts were taken prior to the approval of the certificate of need application in order to be in a position to develop the Project as quickly as possible upon approval.

D. In its discussion with the banks for financing and in obtaining an appraisal of the property, Grotgen became aware that a certain level of rent would be required in order to secure financing for the Project. Grotgen and Britthaven had previously agreed prior to filing the certificate of need application that a rental rate on the Project, a new lease term for the expanded facility, and a new rental rate for the lease of the existing 50 beds for any extension of the current lease term would have to be negotiated upon approval of the Project.

E. Following the approval of the Project and the issuance of the certificate of need, it was determined that Green Engineering, the engineers for the Project, had incorrectly concluded that the Project could be built on the back portion of the property and that instead the Project would have to be placed in the front portion of the property. Such placement would require another zoning change from B-2 to O&I which would negatively affect the value of the property by approximately \$100,000 and would also detract from the aesthetic beauty of the property due to the required removal of a substantial number of trees.

F. Thereafter, in the fall of 1990, Grotgen and Britthaven met on several occasions to arrive at mutually agreeable terms for an extension of the lease term and the rent for the facility upon expansion. Britthaven's initial offer concerning the rent on the Project was to increase the rent to cover only principal and interest on the amount borrowed to finance the addition. Grotgen's accountant determined that under this proposal Grotgen would incur a loss of approximately \$256,048 over the life of the current 15 year lease. Britthaven's only other proposal concerning the rent involved the payment of a flat rate of \$7.00 per bed per day for the life of a 15 year lease with no adjustments for inflation. The most recent available information at that time regarding average nursing home rental rates in North Carolina, as determined by the Division of Medical Assistance, Department of Human Resources, indicated that the average rate for 1988 was \$6.44. Since this proposal offered a rental rate below estimated market rates in 1990 and significantly below market by 2003, Grotgen determined that this proposal was not financially feasible and, if agreed to, would further negatively impact the value of the property.

G. Thereafter, Britthaven and Grotgen determined that a possible resolution of their differences which would permit further development of the Project was to negotiate a sale of the entire

facility to Britthaven, Grotgen obtained a consultant to help it evaluate the worth of the nursing home and made an offer to sell the facility to Britthaven.

H. Through the summer of 1991, Grotgen engaged in serious and good faith negotiations with Britthaven for the sale of the facility, but the parties were unable to reach a mutually agreeable purchase price. The suggestion of a tax-free exchange was explored as another means to negotiate the sale of the facility, but such an approach was determined unworkable by Grotgen's accountant.

1. Despite the CON Section's notice of intent to withdraw the certificate of need in July of 1991 and its subsequent decision to withdraw the certificate from each holder in September of 1991, Britthaven and Grotgen have continued to negotiate possible solutions to their lease differences in order to permit further development of the Project.

J. When, as a part of these continued negotiations, Britthaven expressed a willingness to have its lease interest bought out and for Grotgen to obtain a new operator as a way to resolve this matter, Grotgen immediately undertook efforts which would enable it to move forward with the Project as soon as possible, such as requesting a rezoning of the front portion of the property, obtaining approval to remove trees on the front portion of the property in accordance with local ordinances, retaining an architect who has prepared preliminary drawings for the Project, conferring with several general contractors regarding construction timetables and costs, attending numerous meetings with banking officials to secure financing for the Project, and holding numerous discussions with interested nursing home operators for the lease or purchase of the facility.

14. The Respondent, by its attorney, stipulated that Grotgen has made good faith efforts to meet the timetable and to develop the Project.

15. Britthaven offered no evidence of any good faith efforts that it has made to meet the timetable and to develop the Project.

16. Grotgen and Britthaven appear unable jointly to develop the Project.

17. The CON Section, in determining that good faith efforts had not been made and were not being made towards the development of this Project, did not consider the efforts as described in paragraph 13 above.

Based on the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. There is no North Carolina case which construes the "good faith" requirement in N.C. Gen. Stat. § 131E-189 or 10 N.C. Admin. Code 3R .0317. Black's Law Dictionary includes several definitions of "good faith," all of which emphasize honesty of purpose or intent, lack of intent to defraud or take advantage, and faithfulness to obligations. Black's Law Dictionary 693 (6th ed. 1990).

North Carolina statutes and case law, in analogous contexts, have defined the term "good faith" as including a duty to make reasonable efforts in fulfillment of one's obligations and honesty in fact in the transaction concerned. See, Weyerhaeuser Company v. Godwin Bldg. Supply, 40 N.C. App. 743, 253 S.E.2d 625 (1979); see also, N.C. Gen. Stat. § 25-1-201.

2. In light of these definitions and standards and the evidence introduced at the hearing, the Respondent has not met its burden of proof that Grotgen has failed to make good faith efforts to meet the timetable for the Project or to develop the Project; therefore, the Respondent's decision to withdraw the certificate of need as to Grotgen was erroneous and not in accordance with law or rule, specifically N.C. Gen. Stat. § 131E-189. However, the Respondent has met its burden of proof that Britthaven has failed to make good faith efforts to meet the timetable for the Project or to develop the Project; the Respondent's decision to withdraw the certificate of need as to Britthaven was proper.

RECOMMENDATION

That Respondent's decision to withdraw the certificate of need be reversed as to Grotgen and affirmed as to Britthaven.

That, by agreement of the Respondent and Grotgen, the Project shall be developed according to the following revised timetable and conditions:

Obtain funds necessary to undertake Project	12/01/92
Completion of preliminary drawings	09/01/92
Completion of final drawings and specifications	11/01/92
Approval of final drawings and specifications by the Construction Section of DFS	01/01/93
Approval of Site by Construction Section of DFS	01/15/93
25% Completion of Construction	04/15/93
50% Completion of Construction	06/15/93
75% Completion of Construction	07/31/93
Completion of Construction	09/15/93
Occupancy/Offering of Services	10/15/93

(1) In the event an agreement between Grotgen and any new operator to whom Grotgen intends to lease or sell the facility is not executed within 120 days after a final decision is entered in this case, then Grotgen agrees to voluntarily surrender the certificate of need to develop the Project to the Respondent.

(2) In the event that construction is not commenced by February 1, 1993, Grotgen agrees to voluntarily surrender the certificate of need to the Respondent.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, Post Office Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with N.C. Gen. Stat. § 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N. C. Gen. Stat. § 150B-36(a).

The agency is required by N. C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy of the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Department of Human Resources.

This the 6th day of July, 1992.

Delores O. Nesnow
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
91 EHR 0818**

ACT-UP TRIANGLE (AIDS Coalition)
to Unleash Power Triangle,)
STEVEN HARRIS, and JOHN DOE,)
Petitioners,)
v.)
COMMISSION FOR HEALTH SERVICES)
of the State of North Carolina,)
RON LEVINE, as Assistant Secretary)
of Health and State Health Director)
for the Department of Environment,)
Health, and Natural Resources of)
the State of North Carolina,)
WILLIAM COBEY, as Secretary of the)
Department of Environment, Health,)
and Natural Resources of the State)
of North Carolina, **DR. REBECCA**)
MERIWETHER, as Chief, Communicable)
Disease Control Section of the)
North Carolina Department of)
Environment, Health, and Natural)
Resources, **WAYNE BOBBITT, JR., as**)
Chief of the HIV/STD Control Branch)
of the North Carolina Department of)
Environment, Health, and Natural)
Resources,)
Respondents.)

RECOMMENDED DECISION

This is contested case was commenced by the filing of a Petition on August 28, 1991. The Petitioners challenge the constitutionality of 15A NCAC 19A .0201(d)(10) which instructed the State Health Director to reduce the number of sites in this state that would continue to offer anonymous testing for the HIV antibody. The State Health Director was charged with selecting no fewer than sixteen sites which would continue to offer anonymous testing until September 1, 1994, at which time all anonymous testing for the HIV antibody would be eliminated in North Carolina.

On October 10, 1991, the Petitioners filed a Motion for a Preliminary Injunction, asking for an Order reactivating anonymous HIV testing in health departments not designated to be regional anonymous testing sites. On October 23, 1991, the Respondents filed a Motion to Dismiss. On November 15, 1991, the undersigned Administrative Law Judge denied both motions.

On January 23, 1992, the undersigned Administrative Law Judge granted partial summary judgment to the Respondents. A hearing on all remaining issues was conducted in Durham, North Carolina on February 12-14, 1992. The record was held open until April 15, 1992 to allow the parties to submit written arguments and proposed findings of fact and conclusions of law.

APPEARANCES

For Petitioners: GLENN, MILLS AND FISHER, Attorneys at
Law, Durham, North Carolina; Stewart W. Fisher appearing.

For Respondents: Mabel Y. Bullock, Assistant Attorney

General and Gayl M. Manthei, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina.

ISSUE

Whether the Respondents (1) substantially prejudiced the Petitioners' rights and exceeded their authority or jurisdiction, (2) acted erroneously, (3) failed to use proper procedure, (4) acted arbitrarily or capriciously, or (5) failed to act as required by law or rule when selecting the sites that would continue to offer anonymous HIV antibody testing in North Carolina.

FINDINGS OF FACT

From official documents in the file, sworn testimony of the witnesses, and other competent and admissible evidence, it is found as a fact that:

1. Petitioner ACT-UP TRIANGLE is the North Carolina chapter of the Aids Coalition to Unleash Power, a non-violent, unincorporated political action group dedicated to the elimination of acquired immunodeficiency syndrome.
2. Petitioner Steven Harris is a citizen and resident of Durham County, North Carolina and is one of the founders of the Triangle Chapter of ACT-UP.
3. ACT-UP TRIANGLE includes among its membership residents of several different North Carolina counties, including residents of Durham, Forsyth, and Yancey counties.
4. John Doe is a citizen and resident of Durham County, North Carolina, who has in the past been anonymously tested for the presence of the human immunodeficiency virus (HIV) at the Durham County Health Department. John Doe is at high risk for exposure to HIV.
5. The human immunodeficiency virus is the virus which causes acquired immune deficiency syndrome (AIDS).
6. The Commission for Health Services ("Commission") is the governmental body which is charged with adopting rules for the protection of the public health and for the detection, control, and prevention of communicable diseases.
7. Ronald H. Levine, M.D., M.P.H. is the Assistant Secretary of Health of the Department of Environment, Health, and Natural Resources and the State Health Director. He has held those positions for ten years. He has a M.D. degree from the State University of New York and a Master's degree in Public Health from the University of North Carolina. He is board qualified in pediatrics, preventive medicine, and public health. In his position as State Health Director, he is responsible for the management of the various public health programs for the State of North Carolina. Among these programs are maternal and child health, health promotion and disease prevention, environmental health, and communicable disease control. Based on his education, background, and experience, Dr. Levine qualifies as an expert in the areas of public health and communicable disease control.
8. Rebecca A. Meriwether, M.D., M.P.H. is the Chief of the Communicable Disease Control Section of the North Carolina Department of Environment, Health, and Natural Resources ("DEHNR"), and she has held this position since September, 1985. Dr. Meriwether received an M.D. degree in 1979 from the Medical College of Georgia. She is board certified in family practice, and she holds a Masters in Public Health in Epidemiology from the University of North Carolina. Based on her education, background, and experience, Dr. Meriwether qualifies as an expert in areas of public health and communicable disease control.

9. William Cobey is the Secretary of the Department of Environment, Health, and Natural Resources of the State of North Carolina.
10. Wayne Bobbitt, Jr. is the Chief of the HIV/STD Control Branch of the Department of Environment, Health, and Natural Resources for the State of North Carolina.
11. The test for HIV infection is a blood test which detects the presence of antibodies to the HIV virus.
12. Since 1985, the State has controlled HIV testing. From the onset, testing was available in all 100 North Carolina counties on both an "anonymous" and "confidential" basis.
13. In an anonymous test, persons being tested are identified only by race, sex, year of birth, and county of residence. A person who requests an anonymous test is not required to provide a name, address, or phone number.
14. When a person is tested confidentially, the testing authorities obtain the name, address, and telephone number of the person being tested. This information is attached to the blood sample and is placed upon a "Communicable Disease Report Card" as set forth in 15A NCAC 19A .0102(a)(2).
15. There is no difference in cost to the State regardless of whether an individual is tested anonymously or confidentially.
16. The Respondent Commission for Health Services met on February 12, 1991 to consider the DEHNR's proposal for decreasing the availability of anonymous testing.
17. At this meeting, the Commission considered the relative advantages and disadvantages of anonymous and confidential testing for the HIV antibody. It heard a summary of comments from six public hearings that had been held throughout the state and it listened to additional comments from the public at the Commission meeting.
18. Previously, the Respondents had considered anonymous HIV testing to be a critical component of the efforts to get essential risk reduction information to those at highest risk for HIV infection because the availability of anonymous testing fosters trust in public health efforts among those at risk for HIV. Trust in the public health efforts increases the willingness of those at highest risk for HIV infection to seek public health assistance and to adhere to public health recommendations regarding transmission of HIV.
19. Now, the Respondents' purpose for offering only regional anonymous testing sites is to provide a location where individuals, if they exist, who will not submit to confidential testing can receive an anonymous test.
20. The Respondents contend that the elimination of anonymous testing will allow state authorities to do better partner notification because confidential testing significantly increases the ability of health professionals to identify, contact, and counsel partners of infected individuals. Such partner notification and counseling is a means to reach persons at extremely high risk for HIV infection--sex and needle partners of individuals with positive tests. Notification of these high risk individuals provides them an opportunity to change their behavior in order to reduce the chances that they may become infected or that they may unwittingly infect others, to be tested, and, if infected, to take advantage of available treatment.
21. Effective partner notification, however, depends upon the voluntary cooperation of the infected person. The State cannot do any partner notification unless an infected person comes in to be tested in the first place.
22. Up through 1990, the DEHNR's Communicable Disease Control Section did not have sufficient staff

to meet its objective regarding post testing counseling for individuals who tested HIV positive or to measure the effectiveness of its partner notification program.

23. The Respondents have not conducted any studies in North Carolina to evaluate the effectiveness of partner notification facilitating behavior change and increasing knowledge of high risk behaviors among patients and partners counseled by public health HIV counselors.

24. Many individuals refuse to provide their names at the time that they seek HIV tests because of their fear of discrimination in jobs, housing, and insurance.

25. Despite the passage of federal and state anti-discrimination laws, many individuals continue to have these fears.

26. At its February 12, 1991 meeting, the Commission adopted a rule, now found at 15A NCAC 19A .0201(d)(10), recommended by Respondents Drs. Meriwether and Levine which instructed the State Health Director to reduce the number of anonymous testing sites in the state. The State Health Director was charged with selecting no fewer than sixteen sites which would continue to offer anonymous testing until September 1, 1994, at which time anonymous testing would be eliminated.

27. The Commission further directed the State Health Director to report back to the Commission every six months on the impact of the reduction of anonymous testing and to make a report and recommendations to the Commission at the February, 1993 meeting.

28. Although the minutes from the February 12, 1991 meeting reflect that Commission members raised questions about how the staff determined what would be an appropriate number of sites, accessibility, and the impact of reducing the number of anonymous test sites, there was no evidence offered to explain how the Commission determined that it would be appropriate for there to be no fewer than sixteen sites that would continue to offer anonymous HIV antibody testing.

29. As State Health Director, Dr. Levine was the individual who was charged by the Commission with selecting the sites which would retain anonymous testing.

30. Dr. Levine invited his staff in the Communicable Disease Control Section to develop recommendations for his consideration. Dr. Meriwether was primarily responsible for development of those recommendations.

31. Dr. Meriwether's goal in selecting sites to recommend was to encourage confidential testing of persons who would accept confidential testing but to also minimize avoidance of testing by people with a very strong preference for anonymous testing. She spoke with various members of her staff about how to accomplish this goal.

32. In February, 1991, David Jolly was the Prevention Program Manager for the Communicable Disease Section of the Division of Epidemiology within DEHNR.

33. It was part of Mr. Jolly's job to make recommendations with respect to the control of HIV infection within the State of North Carolina.

34. On February 28, 1991, Mr. Jolly sent a memorandum to Respondents Bobbit, Meriwether, and Levine in which he recommended that at least 23 local health departments be designated as anonymous testing sites.

35. The sites recommended by Mr. Jolly included 14 of the 15 sites that accounted for 70% of all anonymous tests conducted in North Carolina during the period from January, 1990 to June, 1990. (The fifteenth site, Orange County, was omitted from the list because of its proximity to two of the other 14 sites, Durham and Wake counties). Nine other sites were included in the recommendation.

to provide residents in more rural parts of the state with reasonable access to anonymous testing services.

36. The twenty-three sites recommended by Mr. Jolly were: Durham, Mecklenburg, Wake, New Hanover, Buncombe, Guilford, Forsyth, Columbus, Rowan, Wayne, Catawba, Cumberland, Onslow, Pitt, Jackson, Watauga, Cleveland, Anson, Moore, Nash/Edgecombe, Halifax, Pasquotank, and Washington.

37. In determining which counties to recommend as sites for continued anonymous HIV testing, Dr. Meriwether utilized the following process:

- a. Locate the sites that had accounted for, in the aggregate, forty to sixty percent of the anonymous testing conducted in the previous year;
- b. Locate the counties that had received Twelve Thousand Five Hundred Dollars (\$12,500) or more in Block Grant money for HIV purposes and could, therefore, serve some residents from outside of the county;
- c. Identify the ten (10) or twelve (12) counties that had done a large portion of the anonymous testing during the previous year and select approximately half, making sure that none of the counties selected were contiguous;
- d. Distribute the sites across the State; and
- e. Make certain that no fewer than sixteen (16) sites were identified.

38. Dr. Levine met with Dr. Meriwether in order to make a decision regarding which counties would retain anonymous HIV testing.

39. Dr. Meriwether submitted four maps to Dr. Levine and recommended the one which she believed provided the best geographic distribution of anonymous testing sites.

40. Dr. Levine reviewed all four maps and selected the map preferred by Dr. Meriwether.

41. Dr. Levine made four changes to the preferred map in order to attain what he felt was the most appropriate geographical balance for the State.

42. The preferred map contained eighteen sites that were identified as potential sites where both anonymous and confidential testing would be retained. Dr. Levine changed the proposal of retaining anonymous testing in Henderson County to Buncombe County, a neighboring county in western North Carolina which was a much larger county with what Dr. Levine felt were significantly greater resources and was somewhat more centrally located in western North Carolina. Dr. Levine changed the proposed retention of anonymous testing in Bertie County to Halifax County, a larger county with a larger health department and which he felt was more accessible in terms of highways and was more appropriately geographically placed. Dr. Levine had the same rationale for changing the proposal of Onslow County to Carteret County. Finally, Dr. Levine deleted Columbus County because of its proximity to New Hanover County.

43. The changes Dr. Levine made to the preferred map did not alter the fact that the seventeen sites selected to be anonymous testing sites had, in aggregate, conducted between forty to sixty percent of the anonymous testing during the previous year.

44. The seventeen sites chosen by Dr. Levine were: Macon, Buncombe, Watauga, Catawba, Mecklenburg, Surry, Guilford, Orange, Wake, Cumberland, Wayne, Halifax, Pitt, Pasquotank, Dare, Carteret, and New Hanover. These sites had performed approximately 54 percent of the anonymous testing during the previous year.

45. Dr. Levine took into consideration the ability of the proposed anonymous testing sites to absorb additional workload should individuals from neighboring areas elect to utilize those sites.
46. Dr. Levine considered whether the proposed sites would yield a significant shift or reduction in the availability and accessibility of anonymous testing. There was no testimony about how Dr. Levine determined that the sites selected would in fact produce the shift or reduction in accessibility he sought to achieve.
47. Dr. Levine did not consider the individual testing rates of any of the counties, but he based his selection on the fact that the counties selected represented a state-wide aggregate of forty to sixty percent.
48. Dr. Levine requested that Dr. Meriwether call each of the seventeen county health departments he had selected to determine if those health departments had any objection to the retention of anonymous testing, and Dr. Meriwether reported back to him that none of the health departments selected had any objections to their selection.
49. Dr. Levine made his final decision and made the announcement of the site selection in a memorandum to local health directors prior to the August 1, 1991 deadline.
50. The site selection was not done on a random basis.
51. The site selection was not based upon demographic data with respect to high risk groups.
52. The site selection was not based upon a proposed scientific study of the effects of reducing the availability of anonymous HIV antibody testing because the decision was made before any scientific study was designed.
53. In the past, Durham County, North Carolina has had the highest rate of HIV infection per capita of any county in North Carolina.
54. Durham County has a particularly high concentration of high risk groups, including IV drug users and gay men.
55. Durham County has had the highest rate of utilization of anonymous testing of any county in North Carolina.
56. Health care professionals who provide treatment to HIV infected clients believe that the elimination of anonymous testing in Durham County would lead to the spread of the HIV infection within the county.
57. There are experts in the fields of infectious disease and the treatment of HIV infection and AIDS who believe that there is no public health rationale for decreasing access to anonymous HIV antibody testing and that doing so will result in an increase rather than decrease in the spread of the disease in North Carolina.
58. Forsyth County and Durham County both received a minimum of block grant funding from the State.
59. Forsyth County and Durham County were within a statistical sample of counties providing forty to sixty percent of the anonymous testing in North Carolina.
60. Dr. Meriwether included Durham County on two of the four maps she presented to Dr. Levine. Other than to achieve geographical distribution, there was no testimony offered regarding how the decision to include or exclude Durham County was reached. There was no testimony offered to explain why the selection of Wake and Orange Counties rather than Durham County and/or other neighboring

counties better effectuated the goal of achieving geographical distribution.

61. There was no testimony offered indicating whether or why Wake County and Guilford County met the criteria for inclusion in the group of sites chosen to continue anonymous testing better than did the neighboring Durham and Forsyth Counties.

62. There was no testimony indicating how the Respondents differentiated amongst the ten to twelve sites that provided the greatest number of anonymous testing in the previous year to determine which of these high utilization sites would continue to offer anonymous testing.

63. The seventeen sites chosen by Dr. Levine do not include any sites in the southern foothills and southern heartland sections of North Carolina.

Based on the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commission is authorized by statute to adopt rules for the detection, control, and prevention of communicable diseases. N.C. Gen. Stat. §130A-I47.

2. The Commission is also required by statute to declare confirmed HIV infection to be a reportable communicable condition. N.C. Gen. Stat. §130A-I35. In addition, the Commission is specifically authorized to establish what information is to be submitted on a communicable disease report. N.C. Gen. Stat. §130A-I41.

3. Whether or not to offer confidential or anonymous HIV antibody testing is the type of policy decision specifically delegated by statute to the Commission. Any challenge to and review of the Commission's policy decision must focus first upon whether the Commission's rule regarding the availability of anonymous HIV antibody testing furthers the detection, control, and prevention of HIV infection, and second upon whether the sites selected to continue offering anonymous HIV antibody testing further the detection, control, and prevention of HIV infection.

4. The Petitioners have argued that the Commission's rule does not aid in the detection, control, and prevention of HIV infection because limiting access to anonymous testing impermissibly discriminates amongst the class of potentially HIV positive individuals by providing easy access to anonymous testing (detection) to some while denying such access to others.

5. Clearly, the State can choose to offer a service to its citizens on a regional basis. Petitioners argue, however, that the State does not offer HIV antibody testing on a regional basis. Instead, the State offers confidential HIV antibody testing in all one hundred counties and has chosen to limit anonymous HIV antibody testing to no fewer than sixteen sites.

6. The Petitioners' contention that there is a distinction between offering a program on a regional basis and offering some facets of a program on a regional basis while other aspects of the program are available statewide is correct. The Petitioners argue that the State has created a special class of citizens who are provided the right (or privilege) of obtaining an anonymous HIV test in the county of their residence, thereby creating a privacy right which is conditional upon a citizen's county of residence and which violates the equal protection clauses of both the federal and state constitutions.

7. There is, however, no constitutional violation when statutes or regulations which have the effect of creating separate classifications preferring one group over another are rationally related to legitimate state interests. Enhancement of the State's ability to control a deadly communicable disease is a

legitimate state interest. The issue then is whether the selection of certain sites furthers that state interest in such a manner that the State's need in promulgating the rule outweighs the burden the rule may impose on those persons subject to it. American Financial Services v. FTC, 767 F.2d 957, 985 (D.C. Cir. 1985).

- 8 Because the Respondents' actions in promulgating the rule limiting access to anonymous HIV antibody testing is a departure from their previous policy of not only providing anonymous testing statewide, but also advocating the effectiveness of partner notification in the context of anonymous testing, the basis for the change must be clearly articulated so as to establish a rational connection between the factors the Respondents considered and the choices made. The Respondents' proffered rationale for limiting access to anonymous HIV testing is the efficacy of provider partner notification as a means of controlling the spread of AIDS in North Carolina.
9. The evidence establishes that although provider partner notification may be more effective than relying upon infected individuals to notify their partners themselves, such provider partner notification cannot take place unless infected persons present themselves for testing and are also willing to provide the necessary information about contacts whom they may have exposed to the risk of contracting the HIV infection.
10. Provider partner notification cannot take place unless the Respondents have sufficient staff to carry out the post testing counselling and notification, and the evidence indicated that DEHNR has not, in the past, had sufficient staff to perform partner notification.
11. If, however, those persons with a strong preference for anonymous testing (gay men and IV drug users) will submit to confidential testing and will provide public health counsellors the names of their contacts, and if the Respondents have sufficient staff to carry out the provider partner notification, then the Commission's phase out of anonymous testing may in fact further the detection, control, and prevention of the HIV infection in this State. Therefore, despite whatever questions the evidence may present about how efficacious provider partner notification will be, limiting access to anonymous testing is a policy decision that has not been clearly shown to be contrary to law.
12. The Respondents must still show, however, that the sites selected to continue offering anonymous HIV antibody testing until September, 1994 enhance the State's ability to detect, control, and prevent HIV infection.
13. In reviewing the evidence presented, it is bothersome that the Respondents failed to present evidence that describes how the factors that were considered during the site selection process actually resulted in the chosen sites.
14. While it is not the task of the administrative law judge ("ALJ") to determine what decision the ALJ sitting as the Respondents would have reached, it is the ALJ's task to determine whether the Respondents have considered the relevant factors and articulated a rational connection between the facts they considered in making their decision and the choice they made. See, Natural Resources Defense Council, Inc. v. NRC, 462 U.S. 87, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983).
15. The absence of the fundamental nexus between the factors the Respondents considered and the actual sites chosen is demonstrated by the deficiencies in the evidence presented by the Respondents.
16. Except for Dr. Levine's testimony about the changes he made in Dr. Meriwether's preferred map and the frequent references to achieving geographical distribution, the Respondents did not present any evidence addressing the specifics of how the factors it considered resulted in selection of the seventeen sites which Dr. Levine announced on August 1, 1991.
17. One of the factors frequently mentioned is that of achieving geographical distribution. There is little or no evidence regarding what the optimum geographical distribution would be. Furthermore, it is

conceivable that any number of various scenarios would achieve geographical distribution. Respondents, themselves, generated at least five different maps. (Four produced by Dr. Meriwether and Dr. Levin's final map). Yet, the Respondents did not present evidence explaining how they determined what distribution across the state best met the goal of maintaining access for those who refuse to submit to confidential testing. There was also no explanation regarding how the chosen sites could meet the goal of geographical distribution when there were no sites chosen in certain areas of the state such as the southern foothills or the southern heartlands.

18. The Respondents stated that one of their objectives was to reduce access to those most likely to choose anonymous testing, yet it chose to retain some sites in high utilizations areas while excluding other high utilization areas without any explanation for why some sites received this treatment and others did not.
19. Although Dr. Levine considered whether the proposed sites would yield a significant shift or reduction in the availability and accessibility of anonymous testing, there was no evidence presented regarding how Dr. Levine determined that the sites selected would in fact produce the shift or reduction in accessibility he sought to achieve.
20. The Respondents failed to offer any explanation regarding how it determined which of the four maps they developed best met the criteria that were considered in drawing up the maps.
21. Those who will be burdened by the effect of the Commission's rule should be able to ascertain precisely why they were excluded from the favored treatment afforded others. That means that citizens of Durham County or of any other county where the Respondents intend to eliminate anonymous HIV testing should be able to point to the specific reasons that mandated their exclusion.
22. Since the evidence presented at the hearing in this matter shows that the Respondents failed to establish a nexus between the criteria that were considered and the actual sites that were chosen, such a deficiency is an indication that the choices made were arbitrary and capricious.
23. The Respondents failed to establish a nexus between the sites chosen and how the selection of those sites furthered the detection, control, and prevention of HIV infection.
24. Rule 19A.0202(d)(10) of Title 15A of the North Carolina Administrative Code is void as applied in this case.

RECOMMENDED DECISION

The Commission for Health Services will make the Final Decision in this contested case. It is recommended that the Commission adopt the Findings of Fact and Conclusions set forth above and declare that the process which resulted in the selection of the seventeen sites that are to continue offering anonymous HIV antibody testing was arbitrary and capricious, thereby rendering the rule reducing the number of sites offering anonymous HIV antibody testing from one hundred to seventeen void as applied in this case.

NOTICE

Before the Commission makes the FINAL DECISION, it is required by North Carolina General Statutes section 150B-36(a) to give each party an opportunity to file exceptions to this RECOMMENDED DECISION, and to present written arguments to those on the Commission who will make the final decision.

The Commission is required by North Carolina General Statutes section 150B-36(b) to serve a copy of the Final Decision on all parties and to furnish a copy to the Parties' attorney of record and to the Office

of Administrative Hearings.

This the 8th day of July, 1992.

Brenda B. Becton
Administrative Law Judge

STATE OF NORTH CAROLINA

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 OSP 0679**

COUNTY OF GUILFORD

L. STAN BAILEY,)
Petitioner)
)
v.)
)
CHANCELLOR MORAN AND UNC -)
GREENSBORO,)
Respondent)

FINAL DECISION

This matter comes on for consideration pursuant to Respondents' Motion to dismiss pursuant to Rules 2 (b) (1) and 12 (b) (6).

For reasons discussed below, the Motion to dismiss for lack of subject matter jurisdiction (Rule 12 (b) (1)) is GRANTED.

Upon review of the Petition and the attachments to the Petition, and considering all allegations to be true for purposes of this motion, it appears that:

1. Petitioner was a state employee, employed by the University of North Carolina (UNC-G). The parties to this contested case are subject to Chapter 126 of the General Statutes and subject to the jurisdiction of the Office of Administrative Hearings and State Personnel Commission.
2. Petitioner and UNC-G entered into a contract on March 24, 1992.
3. Pursuant to the contract, UNC-G agreed to reinstate Petitioner to his position at UNC-G.
4. Pursuant to the contract, UNC-G agreed to pay Petitioner all salary and fringe benefits due from the date of his separation from employment through March 24, 1992.
5. Pursuant to the contract, Petitioner agreed to resign his position at UNC-G effective 5:00 p.m., March 24, 1992.
6. Petitioner alleges that Respondents have not executed their contractual obligations. For purposes of this motion, the allegation is deemed to be true.
7. Petitioner is not an employee of UNC-G subject to Chapter 126 of the General Statutes.

Accordingly, the undersigned concludes that no contested case as defined by Chapter 150B-2 exists; that Petitioner's dispute with UNC-G is contractual in nature; and that jurisdiction of this case lies with the General Court of Justice.

Accordingly, it is unnecessary to rule on Respondents' motion to dismiss pursuant to Rule 12 (b) (6).

This the 10th day of July, 1992.

Thomas R. West
Administrative Law Judge

The North Carolina Administrative Code (NCA C) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCA C is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.

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